

Assuring the express trust : the so-called 'beneficiary's proprietary claim'

Author:

Hudson, Jessica

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Assuring the Express Trust: The So-called ‘Beneficiary’s Proprietary Claim’

Jessica Hudson

**A thesis in fulfilment of
the requirements for the degree of
Doctor of Philosophy**



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Thesis/Dissertation Sheet

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Given name:	JESSICA, ROSE	School:	Law
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<p style="text-align: center;">Abstract</p> <p>This thesis examines a phenomenon according to which a beneficiary of an express trust has a proprietary claim against a third party that facilitates the recovery of trust property or its traceable substitute (referred to as the beneficiary's proprietary claim or 'the claim'). As this thesis will show, relevant case law and academic scholarship have failed to understand the phenomenon as it is evidenced in the cases.</p> <p>This thesis contributes to our understanding of a fundamental aspect of the express trust by developing a new account of the beneficiary's proprietary claim that is derived from its operation and effect, as evidenced in the cases. The core argument of this thesis is that the beneficiary's proprietary claim is part of a novel phenomenon according to which equity implements an institutional commitment to the express trust by providing an assurance that power will not be exercised in a manner that undermines the essential feature of an express trust. That feature is that the trustee holds and exercises her powers over trust property in accordance with the trust terms. When a power over trust property is exercised in a way that undermines this feature, the claim recognises an equity for relief necessary so that it is as if the exercise of power had not occurred. In this way, the claim assures against the problem that power can be exercised in a manner that undermines the essential feature of an express trust.</p> <p>The thesis explores various justifications for the beneficiary's proprietary claim and argues that the institutional vulnerability of the express trust justifies the assurance provided by the claim, the strict liability it imposes upon a recipient, and its priority and extension to traceable substitutes. The broader significance of this thesis is that it demonstrates the existence of equitable controls on power that ensure that the express trust functions consistently with equity's choice to recognise the express trust. The law is as stated at 1 August 2019.</p>			
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The law is as stated at 1 August 2019.

Summary Table of Contents

CHAPTER 1 – INTRODUCTION AND FOUNDATIONS	1
A. Introduction	1
B. Problem and solution in outline.....	4
C. Conceptual foundations.....	9
D. Chapter-by-chapter outline.....	21
CHAPTER 2 – THE LIMITS TO EQUITABLE TITLE	23
A. Introduction	23
B. The proprietary rights account	24
C. Flawed reliance on equitable title.....	29
D. Unjust enrichment account – outline	43
E. Conclusion.....	48
CHAPTER 3 – A NON-COMPLIANT EXECUTION AND EQUITY’S INSTITUTIONAL COMMITMENT TO THE EXPRESS TRUST	50
A. Introduction	50
B. Equity’s standards are equitable controls on power	52
C. Equity’s commitment to the essential feature of an express trust.....	56
D. Standards for the exercise of power are necessary to implement equity’s commitment.....	65
E. Equity’s standards are the minimum necessary to implement equity’s commitment.....	70
F. Conclusion.....	91
CHAPTER 4 – THE BENEFICIARY’S PROPRIETARY CLAIM AND A NON-COMPLIANT EXECUTION	93
A. Introduction	93
B. Method and approach	93
C. The claim is available where there is a non-compliant execution	98
D. Remedial response(s) to the beneficiary’s proprietary claim	111
E. Conclusion.....	127

SUMMARY TABLE OF CONTENTS

CHAPTER 5 – THE BENEFICIARY’S PROPRIETARY CLAIM DOES NOT RESPOND TO WRONGDOING	128
A. Introduction	128
B. The claim is available even where there is no trustee wrongdoing.....	129
C. The claim is not available where equity’s standards are satisfied, despite trustee wrongdoing.....	132
D. Conclusion.....	156
CHAPTER 6 – X’S RESPONSIBILITY	157
A. Introduction	157
B. X’s responsibility – content	158
C. X’s responsibility – form.....	159
D. Condition for X’s liability	171
E. X’s strict responsibility and role of conscience in equity	182
F. Conclusion.....	191
CHAPTER 7 – WHO CAN ASSERT THE BENEFICIARY’S PROPRIETARY CLAIM?	193
A. Introduction	193
B. Availability of the beneficiary’s proprietary claim	194
C. Addressing competing arguments	216
D. Conclusion.....	224
CHAPTER 8 – DEFENCES, DENIALS AND EQUITABLE DISCRETION	225
A. Introduction	225
B. Denials, defences and equitable discretionary factors	226
C. The change of position defence and the beneficiary’s proprietary claim...	245
D. Conclusion.....	252
CHAPTER 9 – THE BENEFICIARY’S PROPRIETARY CLAIM AS AN ASSURANCE FOR THE ESSENTIAL FEATURE OF AN EXPRESS TRUST	253
A. Introduction	253
B. The beneficiary’s propriety claim functions as an assurance.....	254
C. Assurance distinguished from the functions of equity’s other controls on power	266
D. The justification for the beneficiary’s proprietary claim.....	269
E. Distinguishing the beneficiary’s proprietary claim from claims that respond to non-compliant execution in other institutional contexts	278
F. Conclusion.....	291

SUMMARY TABLE OF CONTENTS

CHAPTER 10 – IMPLICATIONS	293
A. Introduction	293
B. The beneficiary’s proprietary claim is not unjust enrichment	293
C. Lack of authority outside unjust enrichment	309
D. Claim does not protect against third-party interference with T’s obligations 316	
E. Overreaching.....	318
F. Change of position?	319
G. Conclusion.....	323
CHAPTER 11 – CONCLUSION	325
A. Summary of main argument	325
B. The beneficiary’s proprietary claim – restated	327
C. Equity’s control of institutional power and definition of authority	329
BIBLIOGRAPHY	331

Detailed Table of Contents

Acknowledgments	i
Summary Table of Contents	ii
Detailed Table of Contents	v
Table of Cases	xi
Table of Legislation	xxii
CHAPTER 1 – INTRODUCTION AND FOUNDATIONS	1
A. Introduction	1
1. The beneficiary’s proprietary claim – the phenomenon	1
2. This thesis’ aim	3
B. Problem and solution in outline	4
1. The problem	4
2. This thesis’ solution	7
C. Conceptual foundations	9
1. The beneficiary’s proprietary claim distinguished	9
2. Taxonomy	14
3. Approach in this thesis	19
4. Significance of this thesis’ inquiry	20
D. Chapter-by-chapter outline	21
CHAPTER 2 – THE LIMITS TO EQUITABLE TITLE	23
A. Introduction	23
B. The proprietary rights account	24
1. Proprietary rights account – outline and variations	24
2. Overreaching	26
3. Trustee’s performance is given proprietary protection against third- party interference	27
C. Flawed reliance on equitable title	29
1. B’s interests distinguished	29
2. B’s interest against T cannot explain or justify B’s claim	32
3. B’s interest against X	39
4. Implications for the proprietary rights account	41
D. Unjust enrichment account – outline	43
1. B’s claim to the original asset	44

DETAILED TABLE OF CONTENTS

2. Claim in relation to traceable substitute.....	44
E. Conclusion.....	48
CHAPTER 3 – A NON-COMPLIANT EXECUTION AND EQUITY’S INSTITUTIONAL COMMITMENT TO THE EXPRESS TRUST	50
A. Introduction	50
B. Equity’s standards are equitable controls on power	52
1. Equity’s standards distinguished from duties	54
2. Equity’s standards distinguished from other controls on power.....	54
3. Equity’s standards may apply beyond the express trust.....	55
C. Equity’s commitment to the essential feature of an express trust.....	56
1. The irreducible core of an express trust demonstrates equity’s institutional commitment.....	56
2. Justifications for the express trust	58
3. Normative expectations of the essential feature of an express trust...	61
D. Standards for the exercise of power are necessary to implement equity’s commitment.....	65
1. Judicial explications of the essential feature of an express trust.....	65
2. Methods for devolution of power in an express trust	66
E. Equity’s standards are the minimum necessary to implement equity’s commitment.....	70
1. Equity’s standards – operation	72
2. Equity’s standards as necessary	85
3. Equity’s standards are the minimum required	88
F. Conclusion.....	91
CHAPTER 4 – THE BENEFICIARY’S PROPRIETARY CLAIM AND A NON-COMPLIANT EXECUTION	93
A. Introduction	93
B. Method and approach	93
C. The claim is available where there is a non-compliant execution	98
1. The beneficiary’s proprietary claim is available when equity’s standards are not met.....	99
2. Cases that rely on equitable title	104
3. Analytical uncertainty re fraud on a power – the void or voidable debate.....	105
4. Analytical uncertainties concerning the bona fides standard.....	108
D. Remedial response(s) to the beneficiary’s proprietary claim	111

DETAILED TABLE OF CONTENTS

1.	Transfer of specific property.....	113
2.	Payment of the value of specific property.....	119
3.	Equitable lien and subrogation	121
4.	Other forms of relief, rescission, injunction and declaration	123
5.	Beneficiary's proprietary claim as a defence	126
E.	Conclusion.....	127
CHAPTER 5 – THE BENEFICIARY'S PROPRIETARY CLAIM DOES NOT RESPOND TO WRONGDOING		128
A.	Introduction	128
B.	The claim is available even where there is no trustee wrongdoing.....	129
1.	A non-compliant exercise of power by D	130
2.	A non-compliant exercise of power by T	131
C.	The claim is not available where equity's standards are satisfied, despite trustee wrongdoing.....	132
1.	Claim is not available if equity's standards are met.....	133
2.	Breach of particular duties.....	135
3.	Other proprietary claims in response to breach of fiduciary duty.....	151
D.	Conclusion.....	156
CHAPTER 6 – X'S RESPONSIBILITY		157
A.	Introduction	157
B.	X's responsibility – content	158
C.	X's responsibility – form.....	159
1.	The form of X's responsibility – outline	159
2.	X is not subject to a duty.....	160
3.	X is not subject to T's duty	163
4.	X's responsibility as a <i>liability</i>	166
D.	Condition for X's liability	171
1.	Retention	172
2.	The subject property.....	174
3.	Implications of extension to the traceable substitute	176
4.	X's liability is not conditioned on X's wrongful or 'non-wrongful' interference with B's proprietary rights.....	180
5.	X's responsibility is not conditioned upon B first exhausting any claims against T	181
E.	X's strict responsibility and role of conscience in equity	182

DETAILED TABLE OF CONTENTS

1.	X's responsibility is strict.....	184
2.	Accounting for contrary cases.....	186
3.	Reconciling B's interest and X's responsibility with role of conscience in equity.....	187
F.	Conclusion.....	191
CHAPTER 7 – WHO CAN ASSERT THE BENEFICIARY'S PROPRIETARY CLAIM?		193
A.	Introduction	193
B.	Availability of the beneficiary's proprietary claim	194
1.	Outline	194
2.	Beneficiary's proprietary claim is available to anyone who qualifies as an object of the trust.....	195
3.	Beneficiary's proprietary claim and charitable trusts	205
4.	Beneficiary's proprietary claim is available to trustees	207
5.	Limits to the availability of beneficiary's proprietary claim and the beneficiary principle	208
C.	Addressing competing arguments	216
1.	Case evidence	217
2.	Beneficiary principle	219
3.	The role of discretion or future contingency in determining the <i>existence</i> , not just <i>creation</i> , of B's entitlement.....	220
D.	Conclusion.....	224
CHAPTER 8 – DEFENCES, DENIALS AND EQUITABLE DISCRETION		225
A.	Introduction	225
B.	Denials, defences and equitable discretionary factors	226
1.	Conceptual framework	227
2.	Regime applicable to the beneficiary's proprietary claim	228
3.	Equitable discretionary bars and factors	236
4.	The beneficiary's proprietary claim is subject to limited equitable discretion.....	243
C.	The change of position defence and the beneficiary's proprietary claim...	245
1.	The issue and its significance	245
2.	Positive law – change of position does not apply	247
3.	Addressing competing arguments in favour of change of position	248
4.	Change of position as a defence generally applicable to claims for restitution?	251

DETAILED TABLE OF CONTENTS

D.	Conclusion	252
CHAPTER 9 – THE BENEFICIARY’S PROPRIETARY CLAIM AS AN ASSURANCE FOR THE ESSENTIAL FEATURE OF AN EXPRESS TRUST		253
A.	Introduction	253
B.	The beneficiary’s propriety claim functions as an assurance.....	254
1.	Assurance – definition	254
2.	The function of the beneficiary’s proprietary claim.....	255
3.	Nature and strength of the assurance	261
4.	Availability of the claim facilitates the assurance of equity’s standards	264
5.	Conclusion – the beneficiary’s proprietary claim implements equity’s institutional commitment.....	265
C.	Assurance distinguished from the functions of equity’s other controls on power	266
1.	Deterrence	266
2.	Prophylaxis.....	267
3.	Disempowerment	268
D.	The justification for the beneficiary’s proprietary claim.....	269
1.	Why assure equity’s standards and the essential feature of an express trust?	269
2.	Justifying the nature and strength of assurance.....	272
E.	Distinguishing the beneficiary’s proprietary claim from claims that respond to non-compliant execution in other institutional contexts	278
1.	Assurance of equity’s standards across other institutional contexts..	278
2.	The beneficiary’s proprietary claim is part of a broader phenomenon	280
3.	Different strengths in assurance provided.....	282
4.	Calibration of strength of assurance to risk profile.....	286
F.	Conclusion.....	291
CHAPTER 10 – IMPLICATIONS		293
A.	Introduction	293
B.	The beneficiary’s proprietary claim is not unjust enrichment	293
1.	Outline and approach	293
2.	The beneficiary’s proprietary claim does not fit within the framework of unjust enrichment	295

DETAILED TABLE OF CONTENTS

3.	B's claim responds to reasons that are different to unjust enrichment	303
4.	A policy-motivated unjust factor approach?.....	308
C.	Lack of authority outside unjust enrichment	309
1.	Outline	309
2.	Authority as a breach of duty.....	310
3.	T/D's unauthorised exercise of power	311
D.	Claim does not protect against third-party interference with T's obligations 316	
E.	Overreaching.....	318
F.	Change of position?	319
1.	Change of position should <i>not</i> be available to X.....	319
2.	Change of position – confined to unjust enrichment	320
3.	Change of position – a general defence to restitution	320
G.	Conclusion.....	323
CHAPTER 11 – CONCLUSION		325
A.	Summary of main argument	325
B.	The beneficiary's proprietary claim – restated	327
1.	Elements of B's claim	327
2.	Extent of B's equity for relief	328
3.	Condition for X's responsibility	328
4.	To whom the claim is available	328
5.	Defences, denials and equitable discretionary factors	328
C.	Equity's control of institutional power and definition of authority	329
BIBLIOGRAPHY		331

Table of Cases

Australia

A-G (NSW) v Perpetual Trustee Co Ltd (1940) 63 CLR 209	206
Agricultural Land Management Ltd v Jackson (No 2) [2014] 48 WAR 1	273, 279
Alexander v Perpetual Trustees WA Ltd (2004) 216 CLR 109	13
Arjon Pty Ltd v Comr State Revenue (2003) 8 VR 502	34
Austin v Khaliffe [1966] 2 NSW 632	121
Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106	39
Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd (2014) 253 CLR 560. 17, 249, 251, 297, 320	
Australian Metropolitan Life Assurance Co Ltd v Ure (1923) 33 CLR 199	77
Australian Securities and Investments Commission v Carey (No 6) (2006) 153 FCR 509 ..	196
Australian Securities and Investments Commission v Drake (No 2) [2016] FCA 1552	57
Australian Super Pty Ltd v Woodward [2009] FCAFC 168	53, 74, 75, 83, 107
Avanes v Marshall (2007) 68 NSWLR 595	216
Bahr v Nicolay (No 2) (1988) 164 CLR 604	232
Barns v Queensland National Bank Ltd (1906) 3 CLR 925	278
Beck v Henley [2014] NSWCA 201	34, 35, 118
Bell Group Ltd (in liq) v Westpac Banking Corp (No 9) [2008] WASC 239	77
Black v S Freedman & Co (1910) 12 CLR 105	11, 154
Blenkinsop v Herbert [2017] WASCA 87	216
Bofinger v Kingsway Group Ltd (2009) 239 CLR 269	17, 123, 297
Break Fast Investments Pty Ltd v Giannopoulos [2011] NSWSC 1508	233
Breen v Williams (1996) 186 CLR 71	129, 130, 136, 143, 144
Breskvar v Wall (1971) 126 CLR 376	232
Briginshaw v Briginshaw (1938) 60 CLR 336	111
Burns Philp Trustee Co Ltd v Viney [1981] 2 NSWLR 216	35
Byrnes v Kendle (2011) 243 CLR 253	59, 238, 240
Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd (1974) 131 CLR 321	281
Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth [2019] HCA 20 5, 30, 33, 36, 38, 41, 62, 63, 67, 73, 212	
Chan v Zacharia (1983) 154 CLR 178	147
Chief Comr Stamp Duties (NSW) v Buckle (1998) 192 CLR 226	73, 196
Chief Comr Stamp Duties (NSW) v ISPT Pty Ltd (1998) 45 NSWLR 639	62, 63, 67
Chong v Chanell [2009] NSWSC 765	4, 23, 114
Citigroup Pty Ltd v National Australia Bank Ltd (2012) 82 NSWLR 391	245
Clay v Clay (2001) 202 CLR 410	26, 150, 151
Cock v Smith (1909) 9 CLR 773	53, 74, 77, 103, 107, 111, 135, 198
Colbeam Palmer Ltd v Stock Affiliates Pty Ltd (1986) 122 CLR 25	42
Commonwealth Bank of Australia v Smith (1991) 42 FCR 390	144

TABLE OF CASES

Comr Stamp Duties (Qld) v Livingston [1965] AC 694	95, 216, 278, 281, 289
Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373.....	153
Cook v Cook (1986) 162 CLR 376	98
Corin v Patton (1990) 169 CLR 525	80
Coroneo v Australian Provincial Assurance Association Ltd (1935) 35 SR (NSW) 391.....	290
CPT Custodian Pty Ltd v Comr State Revenue (2005) 224 CLR 98	33, 34, 35, 36, 64, 118, 197, 201, 212
Crossman v PILT Nominees [2009] NSWSC 393.....	202, 214
Crossman v PILT Nominees Pty Ltd [2008] NSWSC 557	202, 214
Crossman v Sheahan [2016] NSWCA 200	57, 91, 202, 214
Crow v Campbell (1884) 10 VLR (Eq) 186	185, 241
Curwen v Vanbreck Pty Ltd [2009] 26 VR 335	203, 218, 222
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 35317, 46, 245, 296, 297	
Deutsch v Deutsch [2012] VSC 227	204, 205
Diao v Cohen [2016] NSWSC 96.....	17
Dick v Dick [1953] Ch 343	126
DKLR Holding Co (No 2) Pty Ltd v Comr Stamp Duties (NSW) (1982) 149 CLR 431	63
DKLR Holding Co (No 2) Pty Ltd v Comr Stamp Duties [1980] 1 NSWLR 510....	29, 30, 36, 38, 40, 62, 63, 66, 67, 164, 197, 284
Donis v Donis (2007) 19 VR 577.....	245
El Sayed v El Hawach [2015] NSWCA 26	201
Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd [1987] FCA 603	14, 285
Equuscorp Pty Ltd v Haxton (2012) 246 CLR 498.....	17, 46, 296, 297
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89... 2, 17, 46, 183, 233, 240, 249, 297, 317	
FCT v ElecNet (Aust) Pty Ltd (2015) 239 FCR 359	30, 65
FCT v Everett (1979) 143 CLR 440.....	81
FCT v Linter Textiles Australia Ltd (in liq) (2005) 220 CLR 592.....	34, 36, 212
Finch v Telstra Super Pty Ltd (2010) 242 CLR 254	60, 135, 136
Fistar v Riverwood Legion & Community Club Ltd (2016) 91 NSWLR 732 . 2, 10, 11, 12, 121, 165, 230	
Fouche v The Superannuation Fund Board (1952) 88 CLR 609	140, 141, 199, 207
Futter v Toohey (1897) 2 SCR (NS) (NSW) Eq 20	97, 104, 114, 174
Gadson v Gadson [2003] WASC 481, 38, 81, 99, 113, 115, 117, 170, 174, 179, 198, 236, 258	
Garrett v L'Estrange (1911) 13 CLR 430.....	59
George v McDonald (1992) 5 BPR 97,391 (NSWSC)	124, 142
Gertsch v Atsas [1999] NSWSC 898	250
Gilbert v Stanton (1905) 2 CLR 447.....	53, 74, 101, 107, 130, 198
Giumelli v Giumelli (1999) 196 CLR 101	11, 112, 240, 245
Glenn v Federal Comr Land Tax (1915) 20 CLR 490	33, 34, 36, 40, 200, 212
Glennon v FCT (1972) 127 CLR 503.....	150, 151
Great Investments Ltd v Warner (2016) 243 FCR 516	2, 12, 155, 228, 229, 281, 283, 284, 314

TABLE OF CASES

Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd (1996) 39 NSWLR 143	149, 282, 285
Green v Wildern Pty Ltd [2005] WASC 83	57
Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296.1, 4, 5, 10, 23, 24, 25, 40, 128, 147, 155, 165, 183, 225, 229, 239, 279, 282	
Hagan v Waterhouse (1991) 34 NSWLR 308	23, 182
Hancock Family Memorial Foundation Ltd v Porteous (2000) 22 WAR 193.....	282
Hancock v Rinehart [2015] NSWSC 646.....	78, 110
Harper v Brown (1884) 8 LR (NSW) Eq 86.....	96, 104, 120, 121, 237, 241
Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298	266
Hart Security Australia Pty Ltd v Boucousis [2016] NSWCA 307	148
Hartigan Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405.....	215, 216
Heperu Pty Ltd v Belle (2009) 76 NSWLR 230.....	11, 12
Herdegen v FCT (1988) 84 ALR 271	63
Hermann v Pitt (1890) 11 LR (NSW) Eq 294.....	100
Highland v Labraga (No 2) [2005] NSWSC 1212	215
Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41 ...	129, 143, 152, 153
Hourigan v Trustees, Executors & Agency Co Ltd (1934) 51 CLR 619.....	238
Howard v Comr Taxation (2014) 253 CLR 83	136, 144, 145, 147
Jenyns v Public Curator (1953) 90 CLR 113.....	190
John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1	240
K & S Corp Ltd v Sportingbet Australia (2003) 86 SASR 312	225, 247
Kakavas v Crown Melbourne Ltd (2013) 250 CLR 392	190, 226, 229
Karger v Paul [1984] VR 161	53, 77, 88, 89, 90, 135
Kauter v Hilton (1953) 90 CLR 86.....	59, 62, 63
Kelly v Toohey (1900) 21 LR (NSW) Eq 33.....	126
Kelly v Toohey (1900) 21 LR (NSW) Eq 40.....	126
Kennon v Spry (2008) 238 CLR 366.....	39, 221
Kent v SS Maria Luisa (No 2) (2003) 130 FCR 12.....	33, 34, 35, 36, 40
Koorootang v ANZ Banking Group Ltd [1998] 3 VR 16	249
Krnjulac v Lincu [2015] NSWCA 367	162, 184, 185, 208
Lampson (Aust) Pty Ltd v Fortescue Metals Group Ltd (No 3) [2014] WASC 162.....	17
Lapin v Abigail (1930) 44 CLR 166.....	239
Latec Investments Ltd v Hotel Terrigal Pty Ltd (1965) 113 CLR 265 . 138, 179, 260, 263, 282, 283, 290	
Leahy v A-G (NSW) [1959] AC 457	211
Leerac Pty Ltd v Fay [2008] NSWSC 1082	57
LHK Nominees Pty Ltd v Kenworthy (2002) 26 WAR 517	142
LHK Nominees Pty Ltd v Kenworthy [2001] WASC 205	142
LHK Nominees Pty Ltd v Kenworthy [2003] HCATrans 246	142
Livingston v Comr Stamp Duties (Qld) (1960) 107 CLR 411	36, 281
Lowe v Pascoe (No 4) [2012] NSWSC 1493.....	152, 153
Lumbers v W Cook Builders Pty Ltd (in liq) (2008) 232 CLR 635.....	17, 297
Macarthur Cook Real Estate Funds Ltd v APN Funds Management Ltd [2013] VSCA 240 107	

TABLE OF CASES

Maguire v Makaronis (1997) 188 CLR 449.....	149, 240
McDonald v Ellis (2007) 72 NSWLR 605.....	204
McGinty v Western Australia (1996) 186 CLR 140.....	93
McNally v Harris [2008] NSWSC 659	2
Mercanti v Mercanti [2016] 50 WAR 495.....	75, 83, 89, 201, 202, 222
Mercanti v Mercanti [2017] HCA 1.....	201
Mercanti v Mercanti [2017] HCASL 59	75, 222
Mills v Mills (1938) 60 CLR 150.....	75
Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6) [2015] FCA 825	76
Moffett v Dillon [1999] 2 VR 480.....	239
Montevento Holdings Pty Ltd v Scaffidi (2012) 246 CLR 325	223, 224
Moon v O'Brien (1924) 42 WN (NSW) 24	100
Morlea Professional Services Ltd v Richard Walter Pty Ltd (in liq) (1999) 96 FCR 217.....	208
Motor Vehicles Insurance Ltd v Woodlawn Capital Pty Ltd (2014) 290 FLR 285.....	57
National Commercial Banking Corp of Australia Ltd v Batty (1986) 160 CLR 251	278
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66	111
Nelson v Nelson (1995) 184 CLR 538.....	233, 234
Netglory Pty Ltd v Caratti [2013] WASC 364	54, 72
Nissen v Grunden (1912) 14 CLR 297	73
O'Halloran v RT Thomas & Family Pty Ltd (1998) 45 NSWLR 262	279
Official Receiver in Bankruptcy v Schultz (1990) 170 CLR 306.....	95
Orr v Ford (1989) 167 CLR 316	41, 230, 238, 239
Owens v Strang (1925) 37 CLR 593.....	104, 184, 233
Palmer v Monk [1962] NSWLR 786	13, 41, 96, 104, 123, 124, 125, 232, 241, 242, 256, 258
Perpetual Trustee Co Ltd v Cowan (No 2) (1900) 21 LR (NSW) Eq 278.....	104, 113, 180, 232, 241
Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165	144
Presbyterian Church of Victoria Trusts Corp v Anstee [2017] VSC 102	6, 104, 208
Public Trustee v Smith [2008] NSWSC 397	204
R v Toohey, ex p Meneling Station Pty Ltd (1982) 158 CLR 327	39
Ramage v Wacław (1988) 12 NSWLR 84.....	215
Randall v Lubrano (unreported, NSWSC, Holland J, 31 October 1975)	204, 218
Rankine v Rankine (unreported, QSC, de Jersey CJ, 3 April 1998).....	57
Re Burton (1994) 126 ALR 557	89
Re Cemcon [2009] FCA 696	208
Re Transphere Pty Ltd (1986) 5 NSWLR 309.....	65
Redman v Permanent Trustee Co of New South Wales Ltd (1916) 22 CLR 84	53, 74, 101, 106, 107, 130, 146, 180, 208, 276
Robb Evans of Robb Evans & Associates v European Bank Ltd (2004) 61 NSWLR 75.....	174
Robins v Incentive Dynamics Pty Ltd (in liq) (2003) 175 FLR 286	149, 279, 282, 285
Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516	93
Scaffidi v Montevento Holdings Pty Ltd [2011] WASC 146	77, 107, 223
Segelov v Ernst & Young Services Pty Ltd (2015) 89 NSWLR 431	57

TABLE OF CASES

Sharp v Union Trustee Co of Australia Ltd (1944) 69 CLR 539.....	281
Sidhu v Van Dyke (2014) 251 CLR 50	245
Sinclair v Moss [2006] VSC 130.....	138, 139
Smith Kline & French Laboratories (Aust) Ltd v Secretary (1990) 22 FCR 73.....	38
Smith Kline & French Laboratories (Aust) Ltd v Secretary (1991) 28 FCR 291.....	38
Sons of Gwalia Ltd v Margaretic (2007) 231 CLR 160	285
Southage Pty Ltd v Vescovi [2015] VSCA 117	17
Spangaro v Corporate Investment Australia Funds Management Ltd [2003] FCA 1025	46, 47, 249
Spellson v George (1987) 11 NSWLR 300	29, 63, 66, 204, 205, 211, 213, 216, 218
Spellson v George (1992) 26 NSWLR 666	240
Strang v Owens (1925) 42 WN (NSW) 183 .. 1, 2, 4, 23, 24, 25, 104, 114, 117, 118, 145, 173, 174, 184, 197, 233, 271, 275, 276	
Stuart v Kingston (1923) 32 CLR 309	13, 104, 114, 232
Stuart v Kingston (1924) 34 CLR 394	13, 104, 114, 232
Sullivan v Sullivan [2006] NSWCA 312.....	245
Super 1000 v Pacific General Securities [2008] NSWSC 1222	233
Svenson v Payne (1945) 71 CLR 531	230
Sze Tu v Lowe (2014) 89 NSWLR 317.....	154, 233
Tobin v Broadbent (1947) 75 CLR 378.....	278, 281, 283
Trustees Executors & Agency Co Ltd v Acting FCT (1917) 23 CLR 576.....	34, 40
United States Surgical Corp v Hospital Products Int'l Pty Ltd (1983) 2 NSWLR 157 ..	152, 153
Uniting Church in Australia Property Trust (NSW) v Monsen [1978] 1 NSWLR 575.....	208
Wambo Coal Pty Ltd v Ariff [2007] NSWSC 589	186
Warman International Ltd v Dwyer (1995) 182 CLR 544	113, 148
White v Shortall [2006] 68 NSWLR 650	62
Wildern Pty Ltd v Green [2009] WASCA 38	91
Willoughby City Council v Roads and Maritime Services (2014) 201 LGERA 177	207
Yanner v Eaton (1999) 201 CLR 351.....	42
Yeomans v Yeomans [2006] 1 Qd R 390	211
Young v Kestel [2003] WASCA 190	248
Young v Murphy [1996] 1 VR 279.....	208
Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484	73, 92, 182, 273
Zhu v Treasurer (NSW) (2004) 218 CLR 530	42

TABLE OF CASES

United Kingdom

Abacus Trust Co (Isle of Man) v Barr [2003] Ch 409	107
A-G v Christ's Hospital (1834) 3 My & K 344	104, 207, 259, 276
A-G v Compton (1842) 1 Y & C Ch Cas 417	6, 104, 206
A-G v Earl of Chesterfield (1854) 18 Beav 596.....	104, 134, 135, 207
A-G v Hall (1853) 16 Beav 388	104
A-G v Kerr (1840) 2 Beav 420.....	241, 242
Agip (Africa) Ltd v Jackson [1990] Ch 265.....	13, 279, 285
Agip (Africa) Ltd v Jackson [1991] Ch 547.....	13
AIB Group (UK) plc v Mark Redler & Co Solicitors [2015] AC 1503.....	92
Akers v Samba Financial Group [2017] AC 424.. 1, 26, 29, 31, 38, 40, 82, 113, 128, 164, 188, 212, 228, 229, 234	
Aleyn v Belchier (1758) 1 Eden 132	74, 75, 77, 78, 101, 106, 126
Allan v Rea Bros Trustees Ltd [2002] EWCA Civ 85.....	100, 114, 240
Armitage v Nurse [1998] Ch 241	51, 53, 57, 76, 77, 91, 164, 236
Armstrong DLW GmbH v Winnington Networks Ltd [2013] Ch 156.....	249, 251
Baden v Société Générale [1993] 1 WLR 509	183
Baker v Archer-Shee [1927] AC 844.....	35
Bank of Credit & Commerce International (Overseas) Ltd v Akindele [2001] Ch 437	183
Bank of Cyprus UK Ltd v Menelaou [2015] UKSC 66.....	2, 16
Banque Financière de la Cité v Parc (Battersea Ltd) [1999] 1 AC 221	16, 46, 296
Barnes v Addy (1874) LR 9 Ch App 244.....	10, 97
Barnes v Rowley (1797) 3 Ves Jr 305	34
Barros Mattos Junior v MacDaniels [2004] EWHC 1188.....	322
Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2) [1980] Ch 515	140
Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2) [1980] 1 All ER 393 .. 13, 279, 283	
Benedetti v Sawiris [2013] UKSC 50	16
Boardman v Phipps [1967] 2 AC 46	144, 148
Boscawen v Bajwa [1996] 1 WLR 328.....	2, 4, 23, 122, 237, 250
Boursat v Savage (1866) LR 2 Eq 134.....	104
Bray v Ford [1896] AC 44	144
Brazil v Durant International Corp [2015] UKPC 35.....	175
Bristol & West Building Society v Mothew [1998] Ch 1.....	78, 136, 144, 147
British Airways plc v Airways Pension Scheme Trustee Ltd [2018] EWCA Civ 1533	75, 83
Campbell v Walker (1800) 5 Ves 678.....	150
Capell v Winter [1907] 2 Ch 376.....	180, 185
Cave v Cave (1880) 15 Ch D 639	100, 121, 179, 259
Chichester Diocesan Fund & Board of Finance (Inc) v Simpson [1944] AC 341.....	95
City of London Building Society v Flegg [1988] AC 54.....	232
Clegg v Pache [2017] EWCA Civ 256	155, 156, 279
Cloutte v Storey [1911] 1 Ch 18. 6, 68, 69, 70, 82, 83, 89, 100, 101, 107, 109, 126, 130, 145, 146, 170, 276, 303, 323	
Cory v Eyre (1863) 1 De GJ & S 149	81, 104, 126, 180, 185, 239, 272

TABLE OF CASES

Cowan v Scargill [1985] Ch 270	110
Criterion Properties plc v Stratford UK Properties LLC [2002] EWCA Civ 1783	183
Criterion Properties plc v Stratford UK Properties LLC [2004] 1 WLR 1846	183, 282
Dance v Goldingham (1873) LR 8 Ch App 902	124, 142
Daubeny v Cockburn (1816) 1 Mer 626.....	101, 126, 130, 180
Devaynes v Robinson (1856) 24 Beav 86.....	96, 97, 99, 104, 134, 241, 243
Dick v Dick [1953] Ch 343	83, 101
Dowager Duchess of Sutherland v Duke of Sutherland [1893] 3 Ch 169	77, 102, 126
Downsview Nominees Ltd v First City Corp Ltd [1993] AC 295	278
Dudley v Champion [1893] 1 Ch 101	96, 97, 104, 114, 117, 119, 120, 173, 241, 243, 276, 303, 323
Duke of Portland v Topham (1864) 11 HL Cas 32 6, 53, 68, 69, 70, 74, 75, 77, 83, 86, 88, 89, 101, 106, 107, 109, 110, 118, 119, 120, 130, 131, 132, 145, 146, 198, 278	
Dunn v Flood (1885) 28 Ch D 586.....	143
Eagle Trust plc v SBC Securities Ltd [1993] 1 WLR 484.....	283
Eaves v Hickson (1861) 30 Beav 136.....	240, 317
Eclairs Group Ltd v JKC Oil & Gas plc [2015] UKSC 71.....	74, 77, 86, 278
Farmer v Martin (1828) 2 Sim 502.....	101, 126
Farrar v Farrars Ltd (1888) 40 Ch D 395.....	151
FHR European Ventures LLP v Cedar Capital Partners LLC [2015] AC 250.....	147
Flemming v Page (1677) Rep Temp Finch 320.....	104
Fletcher v Collis [1905] 2 Ch 24	240
Foskett v McKeown [2001] 1 AC 102. 1, 2, 4, 16, 18, 23, 25, 28, 30, 38, 41, 81, 97, 104, 114, 115, 117, 118, 128, 145, 170, 172, 173, 174, 175, 176, 179, 181, 184, 197, 225, 229, 236, 244, 245, 247, 258, 259, 271, 275, 276	
Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480	283
Freeman v Ansbacher Trustees (Jersey) Ltd [2009] JRC 003	201
Fung v Tong [1918] AC 403.....	240
Fyler v Fyler (1841) 3 Beav 550.....	317
Gartside v IRC [1968] AC 553.....	35, 216
General Assembly of Free Church of Scotland v Overton [1904] AC 515	74
Gilmour v Coats [1949] AC 426.....	206
Gisborne v Gisborne (1877) 2 App Cas 300	69, 77, 87, 89
Gordon v Gonda [1955] 1 WLR 885	281
Green v Russell [1959] 2 QB 226	63, 212
Haldenby v Spofforth (1839) 1 Beav 390.....	99, 104, 314
Harries v Church Comrs [1992] 1 WLR 1241.....	110
Harrison v Randall (1852) 9 Hare 397.....	131
Hayim v Citibank NA [1987] AC 730.....	13, 69, 88, 89
Heinl v Jyske Bank (Gibraltar) Ltd [1999] 1 Lloyd's Rep Bank 511	283
Hill v Simpson (1802) 7 Ves Jun 153	281
Hillsdown Holdings plc v Pensions Ombudsman [1997] 1 All ER 862..	81, 101, 114, 117, 131
Hogg v Cramphorn Ltd [1967] 1 Ch 254	76
Hopkins v TL Dallas Group Ltd [2004] EWHC 1379.....	287

TABLE OF CASES

Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821	76, 278
Hunter v Moss [1994] 1 WLR 452	62
IMG Pension Plan HR Trustees Ltd v German [2009] EWHC 2785	103
Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589	76
Independent Trustee Services Ltd v GP Noble Trustees Ltd [2010] EWHC 1653.....	185, 194, 199
Independent Trustee Services Ltd v GP Noble Trustees Ltd [2013] Ch 91 10, 11, 13, 26, 100, 108, 112, 114, 117, 155, 161, 165, 187, 194, 199, 229, 230, 259, 271, 276	
Ingram v IRC [1997] 4 All ER 395	63, 150, 151
Ingram v IRC [2000] 1 AC 293	63, 151
Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd [2019] AC 271.....	38, 73, 188
Investment Trust Companies v Revenue and Customs Comrs [2018] AC 275..	296, 297, 299, 300
Item Software (UK) Ltd v Fassihi [2004] EWCA Civ 1244	144
JJ Harrison (Properties) Ltd v Harrison [2001] EWCA Civ 1467.....	155, 283
JKX Oil & Gas plc v Eclairs Group Ltd [2014] EWCA Civ 640	74, 77
Joyce v DeMoleyns (1845) 2 Jo & Lat 374	263
Jyske Bank (Gibraltar) Ltd v Spjeldnaes (No 2) [1999] WL 819062	285
Keech v Sandford (1762) Sel Cas Ch 61	129, 143
Kennedy v De Trafford [1897] AC 180	278
Keppell v Bailey (1834) 2 My & K 517.....	40
King v Victoria Insurance Co Ltd [1896] AC 250.....	81
Knight v Knight (1840) 3 Beav 148.....	59, 62, 63
Knox v Gye (1872) LR 5 HL 656	285
Lane v Page (1754) Amb 233	74, 83, 101, 106, 126
Learoyd v Whitely (1887) 12 App Cas 727	140
Leask v Pole (1863) 33 LJ Ch 155	314
Lemos v Coutts (Cayman) Ltd (2005) 8 ITELR 153	201
Lewis v Hillman (1852) 3 HL Cas 607	151
Lindsay Petroleum Co v Hurd (1894) LR 5 PC 221	228, 238
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548	245, 246, 249, 251, 281, 320, 322
Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd [1926] AC 108	172
Love v L'Estrange (1727) 5 Bro PC 59	34
Lumley v Gye (1853) 2 El & Bl 216	317
Mackechnie v Marjoribanks (1870) 39 LJ Ch 604	131
Macmillan Inc v Bishopsgate Investment Trust plc (No 3) [1995] 3 All ER 747 ..	10, 165, 174, 175
Mallott v Wilson [1903] 2 Ch 494	230
Mansell v Mansell (1732) 2 P Will 678 SC.....	104
McPhail v Doulton [1971] AC 424.....	196, 200, 211
Menelaou v Bank of Cyprus plc [2016] AC 176.....	122
Mettoy v Evans [1990] 1 WLR 1587.....	67
Ministry of Health v Simpson [1951] AC 251.....	94, 182, 247, 249, 323
Molyneux v Fletcher [1898] 1 QB 648	92

TABLE OF CASES

Morice v Bishop of Durham (1804) 9 Ves 399	63, 193
Morice v Bishop of Durham (1805) 10 Ves Jr 522	63, 193, 210
Moschi v LEP Air Services Ltd [1973] AC 331	161
Nabb Bros Ltd v Lloyds Bank International (Guernsey) Ltd [2005] EWHC 405	10, 112, 165
Nelson v Larholt [1948] 1 KB 339	281
Newton v Newton (1868) 4 Ch App 143	263
OBG Ltd v Allan [2008] 1 AC 1	317
Papadimitriou v Crédit Agricole Corp & Investment Bank [2015] UKPC 13.....	186, 187
Paragon Finance plc v DB Thakerar & Co [1999] 1 All ER 400	155
Patel v Mirza [2017] AC 467	233
Pearce v Newlyn (1818) 3 Madd 186.....	104, 238
Pearson v Lehman Bros Finance SA [2010] EWHC 2914.....	62, 64
Perham v Kempster [1907] 1 Ch 373.....	96, 97, 104, 126, 134, 271
Phayre v Peree (1815) 3 Dow 116	104
Phillips v Phillips (1861) 4 De G F & J 208	138, 179, 260, 263, 283
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827	161
Pickering v Pickering (1939) 4 My & Cr 289.....	59
Pilcher v Rawlins (1872) LR 7 Ch App 259.....	100, 185, 228, 229
Pitt v Holt [2012] Ch 132	100, 128, 133, 137
Pitt v Holt [2013] 2 AC 108	74, 76, 85, 128, 133, 135, 136, 137, 138, 149, 276
Powell v London & Provincial Bank [1893] 1 Ch 610	124, 185, 239
Powell v London & Provincial Bank [1893] 2 Ch 555	104, 124, 185, 239
Prudential Assurance Co Ltd v Revenue and Customs Comrs [2018] UKSC 39	297
Pryor v Pryor (1864) 2 De GJ & S 205	83, 89, 101, 106, 126, 130, 146
Re Abrahams' Will Trusts [1969] 1 Ch 463	83
Re Courage Group's Pension Schemes [1987] 1 WLR 495.....	75, 83
Re Crawshay [1947] Ch 356.....	83, 101, 106, 126
Re Crawshay [1948] Ch 123	83, 101, 106, 126
Re Cross; Harston v Tenison (1882) 20 Ch D 109.....	239
Re Deane (1889) 42 Ch D 9.....	131
Re Diplock [1947] Ch 716	94, 95
Re Diplock [1948] Ch 465	4, 23, 94, 96, 182, 190, 230, 248, 249
Re Duke of Norfolk's Settlement Trusts [1981] 3 All ER 220	59, 73
Re Eustace [1912] 1 Ch 561	238
Re Gestetner Settlement [1953] Ch 672.....	200
Re Greaves [1954] Ch 434	87
Re Hallett's Estate (1880) 13 Ch D 696.....	30, 176, 279, 311
Re Hastings-Bass [1975] Ch 25	135
Re Hay's Settlement Trusts [1982] 1 WLR 202	88, 89, 90
Re IMG Pension Plan [2009] EWHC 2785	83
Re Loftus [2005] EWHC 406.....	186
Re Londonderry's Settlement [1964] Ch 594	215, 216
Re Londonderry's Settlement [1965] Ch 918	69, 87

TABLE OF CASES

Re Manisty's Settlement [1974] Ch 17	201, 218, 219
Re Marsden's Trust (1859) 4 Drew 594	75, 101, 126, 130
Re Maye [2008] UKHL 9	95
Re Montagu's Settlement Trusts [1987] 1 Ch 264.....	10, 100, 114, 162, 163, 165, 173, 184, 188, 234
Re Pauling's Settlement Trusts [1964] Ch 303.....	92
Re Salmon (1889) 42 Ch D 351	134, 140, 141
Re Sharpe [1892] 1 Ch 154	279
Re Simpson; Chadderton v Simpson [1952] Ch 412	83, 101, 106, 126
Re Smith [1896] 1 Ch 71	78
Re Thompson's Settlement [1986] 1 Ch 99	151
Re Wells [1933] Ch 29.....	290
Reckitt v Barnett, Pembroke & Slater Ltd [1929] AC 176	278, 283, 287
Rede v Oakes (1864) 4 DJ & S 505	143
Regal Hastings v Gulliver [1967] 2 AC 46	144, 147, 148
Relfo Ltd v Jadvavarsani [2012] EWHC 2168	304
Relfo Ltd v Varsani [2014] EWCA Civ 360	175, 304
Revenue and Customs Comrs v Investment Trust Companies [2017] UKSC 29	47
Rice v Rice (1853) 2 Drew 73	138, 179, 239
Roadchef (Employee Benefits Trustees Ltd) v Hill [2014] EWHC 109..	81, 101, 114, 131, 173
Rolled Steel Products (Holdings) Ltd v British Steel Corp [1968] Ch 246.....	82, 278, 285, 287
Sainsbury v IRC [1970] 1 Ch 712	33, 35, 200, 216
Saunders v Vautier (1841) 4 Beav 115.....	34, 197
Saunders v Vautier (1841) Cr & Ph 240	34, 64, 118, 197, 201
Schmidt v Rosewood Estate [2003] 2 AC 709	33, 63, 200, 205, 211, 216, 218
Scottish Equitable plc v Derby [2001] EWCA Civ 369	245
Selwyn v Garfit (1888) 38 Ch D 273	278
Selwyn v Garfit (1888) 38 Ch D 280	278
Shalson v Russo [2005] Ch 281	137
Sharples v Adams (1863) 32 Beav 213.....	73
Shropshire Union v R (1865) LR 7 HL 496	4, 5, 13, 23, 24, 25, 41, 104, 126, 180, 185, 230, 239, 263
Sieff v Fox [2005] EWHC 1312	100, 138
Space Investments Ltd v CIBC Trust Co (Bahamas) Ltd [1986] 1 WLR 1072	30, 53, 63, 73, 86, 100, 133, 212, 314
Speight v Gaunt (1883) 22 Ch D 727	140
State Bank of India v Sood [1997] Ch 276.....	27
Stroughill v Anstey (1852) 1 De GM & G 635.....	126, 134, 314, 323
Stroughill v Anstey (1852) 22 LJ Ch 130.....	97, 100, 104, 263, 303
Swiss Bank Corp v Lloyds Bank Ltd [1979] Ch 548	38
Target Holdings v Redferns [1996] 1 AC 421	63, 73, 212
Taylor v London & County Banking Co [1901] 2 Ch 231	100, 239
Test Claimants in the FII Group Litigation v HMRC (No 2) [2014] EWHC 4302.....	322
Thorndike v Hunt (1859) 3 De G & J 563	100

TABLE OF CASES

Thorner v Major [2009] UKHL 18.....	245
Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1.....	111
Tito v Waddell (No 2) [1977] Ch 106	150
Topham v Duke of Portland (1863) 1 De GJ & S 517	86, 118, 120, 134
Topham v Duke of Portland (1869) LR 5 Ch App 40	86
Trustee of the Property of FC Jones & Sons v Jones [1997] Ch 159	120
Turner v Turner [1984] Ch 100	81, 102, 103, 107, 110, 138, 139
Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638.....	172, 173, 184, 236
Vandepitte v Preferred Accident Insurance Corp of New York [1933] AC 70.....	13
Vatcher v Paull [1915] AC 372	77, 86
Walley v Walley (1687) 1 Vern 484	104
Wellesley v Earl of Mornington (1855) 2 K & J 143	101, 126, 130
Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669 ...	112, 186, 188, 284
White v Damon (1802) 7 Ves 30	40
William Brandt's Sons & Co v Dunlop Rubber Co Ltd [1905] AC 454.....	80
Williams v Central Bank of Nigeria [2014] AC 1189.....	10, 11, 155, 161, 165, 232
Wilson v Turner (1883) LR 22 Ch D 521	103
Yorkshire Bank plc v Hall [1999] 1 WLR 1713	278
Yorkshire Miners' Association v Howden [1905] AC 256.....	3, 5, 43, 199, 200

Other

Kingsway Investments v New Brunswick (Dept Finance) [2007] 1 SCR 3	297
Loan Investment Corp of Australia v Bonner [1970] NZLR 724	40
Peel (Regional Municipality) v Canada [1992] 3 SCR 762	297
Re French's Estate (1887) 21 LR (Ir) 283 (CA Ir).....	179
Wong v Burt [2004] NZCA 174.....	81, 101, 114, 131, 278

Table of Legislation

Australia

Commonwealth

Admiralty Act 1988	35
Bankruptcy Act 1966	30
Corporations Act 2001.....	30, 278, 283

New South Wales

Charitable Trusts Act 1993	206
Conveyancing Act 1919	80, 81
Limitation Act 1969	231
Partnership Act 1892	278
Perpetuities Act 1984	73
Probate and Administration Act 1898	30, 281
Real Property Act 1900.....	80, 184, 232
Succession Act 2006	30
Trustee Act 1925	73, 131, 235
Uniform Civil Procedure Rules 2005	189

Queensland

Succession Act 1981	248
Trusts Act 1973	248

Western Australia

Property Law Act 1969	248
Trustees Act 1962	248

England

Administration of Estates Act 1925	95
Companies Act 2006.....	278, 283
Finance Act 1940	35
Imperial Acts Application Act 1969	206
Land Registration Act 2002.....	232
Law of Property Act 1925	27, 80, 81, 290, 319
Limitation Act 1980	231, 232
Settled Lands Act 1882	102
Statute of Charitable Uses 1601, 43 Eliz I, c 4	206
Trade Union Acts 1871, 1876	43, 200
Trustee Act 1925	73, 131, 235
Trusts of Land and Appointment of Trustee Act 1996	232

Chapter 1 – Introduction and foundations

A. Introduction

This thesis examines the phenomenon by which a trust beneficiary (referred to as ‘B’ in this thesis) has a claim for equitable relief against a third party (referred to as ‘X’ in this thesis) that facilitates the recovery of trust property, or its traceable substitute.¹ This phenomenon is the so-called ‘beneficiary’s proprietary claim’. This claim was described in *Grimaldi v Chameleon Mining NL (No 2)* by the Full Court of the Federal Court of Australia in the following terms:

[A] third party who acquires ... title to trust property ... will be liable in proprietary, in rem, proceedings to make specific restitution to the ‘true owner’ of such trust property (or its traceable proceeds) as remains in his or her hands. While this type of claim is, potentially, available to be made in *Barnes v Addy* ‘knowing receipt’ cases, it is a separate and distinct liability. It is, in essence, a claim to priority.²

Relevant case law and academic scholarship have failed to explain the beneficiary’s proprietary claim as it is evidenced in the cases. This thesis offers a novel account of the function of, and justification for, the claim. The thesis argues that the claim implements equity’s institutional commitment to the express trust. The claim responds to the problem that powers held subject to an express trust can be exercised in a manner that undermines equity’s choice to recognise the institution.

1. The beneficiary’s proprietary claim – the phenomenon

Gadson v Gadson is an illustrative example of the claim.³ In this case, the trustee (referred to as ‘T’ in this thesis) transferred land held on trust to X. The trust terms expressly excluded X from receiving trust property as a beneficiary. B successfully asserted a proprietary claim against X for recovery of the land.

¹ As recognised in: *Strang v Owens* (1925) 42 WN (NSW) 183; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 [251] (the Court); *Foskett v McKeown* [2001] 1 AC 102, 127–29; *Akers v Samba Financial Group* [2017] AC 424 [51]–[52] (Lord Mance; Lord Neuberger, Lord Sumption, Lord Collins and Lord Toulson agreeing), [82]–[83] (Lord Sumption).

² *Grimaldi* (n1) [251] (the Court).

³ *Gadson v Gadson* [2003] WASC 48.

The claim is also available in relation to property identified as the traceable substitute of the original trust property. An example is *Strang v Owens*.⁴ In this case, T transferred trust funds into X's bank account. B successfully claimed against X, and X was ordered to pay B the sum that had been paid by T into X's bank account. The property subject to B's claim was not the property originally held and dealt with by T (being T's title to the chose in action against T's bank) but the traceable substitute, being X's title to the chose in action against X's bank.

Further, B's claim is not confined to the immediate recipient who dealt directly with T. B can claim against a remoter recipient, which is shown by *Foskett v McKeown*.⁵ In this case, B successfully claimed against a remote recipient of the traceable substitute of trust property.

These cases evidence a core pattern according to which B has a claim against X for relief requiring X to deal with X's title to the subject property in a particular way, for example to transfer trust property, or its traceable substitute to T. There are variations of this pattern; some will be considered later in this thesis, and some will be introduced later in this Chapter.

The existence and parameters of this claim are considered 'orthodox'.⁶ Nonetheless, B's claim has been identified by various labels, for example the 'equitable tracing claim',⁷ 'tracing remedy',⁸ 'proprietary claim'⁹ or 'equitable proprietary claim'.¹⁰ For the sake of clarity, this thesis will use the labels 'beneficiary's proprietary claim', 'B's claim', and 'the claim'. However, as will be discussed in Chapter 2, this thesis uses the label 'proprietary' *only to describe particular features of the claim*. The label is not itself an engine of normative argument from which further conclusions about the claim can be derived.

⁴ *Strang* (n1).

⁵ *Foskett* (n1).

⁶ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [140] (the Court).

⁷ *Boscawen v Bajwa* [1996] 1 WLR 328, 334 (Millet LJ).

⁸ *McNally v Harris* [2008] NSWSC 659 [155] ('tracing claim'), [89] ('tracing remedies') (White J).

⁹ *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 [59], [100] (Lord Neuberger P).

¹⁰ *Great Investments Ltd v Warner* (2016) 243 FCR 516 [55] (the Court); *Fistar v Riverwood Legion & Community Club Ltd* (2016) 91 NSWLR 732 [46] (Leeming JA; Bathurst CJ and Sackville AJA agreeing).

2. This thesis' aim

This thesis' aim is to provide an account of the function of, and justification for, the beneficiary's proprietary claim. This account will be derived from the operation and effect of the claim as evidenced in the relevant cases. There is a need for a novel and accurate account of the beneficiary's proprietary claim because the normative basis of the claim, as accepted by relevant case law and academic scholarship, does not withstand the rigour of analysis required to account for the claim as it is evidenced in the cases. This can be briefly demonstrated by reference to another key case, *Yorkshire Miners' Association v Howden*, where Lord Lindley stated that the 'object [of the beneficiary's proprietary claim] is to vindicate [B's] right to property'.¹¹ With respect, Lord Lindley was correct in identifying equitable title as the normative basis for the beneficiary's proprietary claim according to case precedent. This thesis' point is that the normative basis for the claim which is accepted in *Yorkshire Miners' Association v Howden* and other cases, does not fit the phenomenon as it is evidenced in the cases. In *Yorkshire Miners' Association*, for example, B was *not* the owner of the subject property; nor did B have an entitlement to the benefit of trust property. In fact, B had a contingent and non-vested interest, and had no present entitlement to trust property. Having regard to the nature of B's interest, the reliance upon B's proprietary right is problematic.

A new understanding of the beneficiary's proprietary claim is needed and supplying this is the aim of this thesis. It will be argued that the claim is one of equity's means of controlling power and implements equity's institutional commitment to the express trust.

The rest of this Chapter will proceed as follows. Part B will develop the problem addressed in this thesis and outline this thesis' solution. Part C will set out some key conceptual foundations and taxonomical assumptions underpinning the analysis in this thesis. Part D will provide a chapter-by-chapter outline of the thesis.

¹¹ *Yorkshire Miners' Association v Howden* [1905] AC 256, 28–83.

B. Problem and solution in outline

1. The problem

The problem addressed in this thesis is to understand when and why B has the proprietary claim against X. As this Part B will show, the need for a new understanding of the beneficiary's proprietary claim has *not* arisen due to a lack of judicial and academic attention to this phenomenon. Indeed, the function and justification for the beneficiary's proprietary claim are well-traversed areas of judicial and academic discourse, and this thesis will engage with some of the conflicting judicial and academic accounts of the claim. As this thesis will show, previous accounts of the beneficiary's proprietary claim have fundamentally failed to understand the claim according to its own terms and as it is evidenced in the cases. These failures are briefly outlined now by reference to some case examples of the beneficiary's proprietary claim.

i. The problems with the metaphor of equitable title

Some cases and some academic commentaries understand B's proprietary claim as an 'equitable analogue' of a proprietary claim that vindicates ownership.¹² Vindication has various meanings in private law.¹³ Professor Peter Birks referred to the beneficiary's proprietary claim as the 'equitable vindicatio',¹⁴ thereby drawing an analogy with the Roman law action called *vindicatio*.¹⁵ The Roman law *vindicatio* demanded that the possessor of the plaintiff's property, the defendant, return the

¹² See eg: *Shropshire Union v R* (1865) LR 7 HL 496, 511 (Lord Hatherley), see also 506 (Lord Cairns LC); *Strang* (n1); *Grimaldi* (n1) [251] (the Court); *Foskett* (n1) 12–29 (Lord Millett); *Re Diplock* [1948] Ch 465, 522 (the Court); *Boscawen* (n7) 334; *Chong v Chanell* [2009] NSWSC 765 [28] (Brereton J); P Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 313–14; S Worthington, *Equity* (2nd edn, OUP 2006) ch 3; G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 1–8, 562–63.

¹³ See eg: J Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34 OJLS 253; Virgo (n12) 16.

¹⁴ A label used in P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 6–5; P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 215–17; A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 13, 169.

¹⁵ B Nicholas, *An Introduction to Roman Law* (Clarendon Press 1962) 100–01; P Birks and E Descheemaeker (eds), *The Roman Law of Obligations* (OUP 2014) 6–11; N McBride, 'Vindicatio: The Missing Remedy' (2016) 28 SAclJ 1052, 1053.

property (or at the defendant's election, its value) to its owner.¹⁶ The beneficiary's proprietary claim is considered analogous with its Roman counterpart as the claim asserts B's equitable ownership and is 'a direct assertion of a right to a thing'.¹⁷

The rhetoric of ownership or equitable title is strong in some cases and scholarship.¹⁸ The beneficiary's proprietary claim has been justified on the basis that B is the 'real'¹⁹ or 'true'²⁰ owner of that property. Despite this rhetoric, it is uncontroversial that B is *not* actually the owner of trust property;²¹ T is the owner. Thus, the concept of ownership or equitable proprietary title is doing some other conceptual work. Other scholars have previously explained that these concepts are used metaphorically to describe particular features of B's interest under an express trust that can be analogised with an owner at law.²²

There are problems with relying on these metaphors of equitable ownership and proprietary title to understand B's claim against X. These problems will be discussed in more detail in Chapter 2. For now, it is sufficient to observe that these metaphors fail to account for the operation and effect of the beneficiary's proprietary claim as it is evidenced in the cases. In addition to *Yorkshire Miners' Association v Howden*, mentioned above, where the beneficiary's proprietary claim was available to B who did *not* have an interest akin to ownership, the problems with the metaphor of equitable title can be demonstrated by additional key case examples.

¹⁶ *ibid.*

¹⁷ See n14.

¹⁸ See n12.

¹⁹ *Shropshire Union* (n12) 506 (Lord Cairns LC), 511 (Lord Hatherley), see also 507–08 (Lord Cairns LC).

²⁰ *Grimaldi* (n1) [251] (the Court).

²¹ *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20 [82] (Bell, Gageler and Nettle JJ).

²² See eg: SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) 6; L Smith, 'Unravelling Proprietary Restitution' (2004) 40 CBLJ 317, 319–21; Worthington, *Equity* (n12) ch 3; B McFarlane, 'Equity, Obligations and Third Parties' [2008] SJLS 308, 313–18.

First there are *Cloutte v Storey*²³ and *Duke of Portland v Topham*,²⁴ where the beneficiary's proprietary claim was available despite the inapplicability of the metaphor of equitable title. In both cases, B, as the object of a discretionary power, had no present right to the benefit of trust property analogous with equitable ownership.

The *second* key case example is *A-G v Compton* where, again, the beneficiary's proprietary claim was available despite the inapplicability of the metaphor of equitable title.²⁵ This case concerned the beneficiary's proprietary claim in the context of a charitable trust. The claim was maintained by the Attorney-General on the relation of members of the parish interested in the charitable trust. Neither the Attorney-General nor the parish members could be understood to have an interest to which the metaphor of equitable title is applicable. Nonetheless the beneficiary's proprietary claim was available.

There are further failings endemic to the metaphors of equitable ownership and proprietary title, which will be discussed further in Chapter 2. The implication is that the account of the beneficiary's proprietary claim that has received strong judicial and academic acceptance fails to explain its subject matter.

ii. Other accounts of the beneficiary's proprietary claim

Other accounts of the claim have been proposed, including those which understand the beneficiary's proprietary claim as a response to: (i) X's unjust enrichment;²⁶ (ii) T's wrongdoing;²⁷ (ii) the persistence of T's duty to not use property for her own

²³ *Cloutte v Storey* [1911] 1 Ch 18.

²⁴ *Duke of Portland v Topham* (1864) 11 HL Cas 32.

²⁵ *A-G v Compton* (1842) 1 Y & C Ch Cas 417, 427. See also: *Presbyterian Church of Victoria Trusts Corp v Anstee* [2017] VSC 102.

²⁶ A small sample includes: Birks, 'Receipt' (n14) 216–21; C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [8-155]–[8-165].

²⁷ L Tucker, N Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) [41-010]–[41-014]; D Salmonds, 'Claims against Third-Party Recipients of Trust Property' (2017) 76 CLJ 399, 407–08.

benefit as against X;²⁸ or (iv) third-party interference with T's performance of her obligations of trusteeship.²⁹ Some of these accounts will be discussed further in this Chapter.

The point, for now, is that all of these previous accounts of the beneficiary's proprietary claim, including vindication of proprietary rights as discussed in Part B.1.i above, have assumed that the claim can be understood in terms of these other legal phenomena. Existing analysis assumes that if it is not one, then it is another. This thesis accepts the task of identifying the legal reason that triggers the beneficiary's proprietary claim. However, this thesis does not accept that the claim can be understood in terms of unjust enrichment, third-party interference, wrongdoing, or the vindication of proprietary rights.

It is important to understand the beneficiary's proprietary claim because it is a key foundation of our conceptual understanding of the express trust. Further, the claim has informed other core private law debates, including the availability of proprietary restitution in response to unjust enrichment,³⁰ the concept of equitable property,³¹ and the process of tracing.³² The foundations of these debates should be strong, and accuracy is required in how we understand the beneficiary's proprietary claim.

2. This thesis' solution

This thesis develops a new account of the beneficiary's proprietary claim. This account is derived from the operation and effect of the claim as the claim is evidenced in relevant cases. The aim is to understand the claim according to its own

²⁸ See eg: B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1, 5; S Agnew and B McFarlane, 'The Paradox of the Equitable Proprietary Claim' in S Agnew and B McFarlane (eds), *Modern Studies in Property Law* (10th edn, Hart Publishing 2019) ch 17.

²⁹ See eg: L Smith, 'Unravelling Proprietary Restitution' (2004) 40 CBLJ 317, 321–27; L Smith, 'Philosophical Foundations of Proprietary Remedies' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of Unjust Enrichment* (OUP 2009) ch 10.

³⁰ See eg: L Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412; L Smith, 'Unravelling Proprietary Restitution' (n29).

³¹ See eg: R Nolan 'Equitable Property' (2006) 122 LQR 232, 234–35; McFarlane and Stevens, 'The Nature of Equitable Property' (n28).

³² See eg: L Smith, *The Law of Tracing* (Clarendon Press 1997); M Conaglen, 'Difficulties with Tracing Backwards' (2011) 127 LQR 432; T Cutts, 'Tracing, Value and Transactions' (2016) 79 MLR 381; A Nair, *Claims to Traceable Proceeds* (OUP 2018).

terms. This thesis re-orientates our understanding of the beneficiary's proprietary claim away from a known and defined set of legal reasons, such as unjust enrichment or proprietary rights. We should instead understand the claim as part of a phenomenon, so far unarticulated, by which equity controls power to give effect to its institutional commitment to the express trust.

The main argument of this thesis is that the beneficiary's proprietary claim implements equity's commitment to the express trust by providing an assurance that power will not be exercised in a manner that undermines the essential feature of an express trust. That feature is that T holds and exercises her powers over trust property in accordance with the trust terms. The significance of the essential feature is that equity's choice to recognise the express trust and the normative justifications for that choice are premised on the express trust having, at a minimum, this essential feature. Equity's commitment to the essential feature is a commitment to ensuring that the express trust functions in line with equity's choice to recognise the institution in the first place.

This commitment is implemented through the imposition of certain controls on the exercise of power, and the assurance of these controls via the beneficiary's proprietary claim. These controls are: (i) compliance with the trust terms; (ii) fidelity to the donor's purpose; and (iii) bona fides. Together, they define the minimum necessary for an exercise of power to be consistent with the essential feature of an express trust. Thus, when there is an exercise of power that does not satisfy one or more of these controls, that exercise is inconsistent with the essential feature of an express trust, and the express trust has failed to function in a manner consistent with its normative expectations.

The function of the beneficiary's proprietary claim is to provide an assurance that power will not be exercised if these controls are not met, by recognising an equity for relief necessary so that it is as if the exercise of power had not occurred. The claim responds to the problem that power held subject to an express trust can be exercised in a manner that undermines the essential feature of an express trust, and equity's choice to recognise the institution.

This thesis will explore various justifications for the beneficiary's proprietary claim. It will argue that the beneficiary's proprietary claim is justified by the vulnerability of the express trust. The express trust is an institution that relies upon the

devolution of power for its function. It devolves power in a way that presents a concomitant risk that power will be exercised in a manner that undermines the essential feature and function of this institution. Specifically, T's title to, and powers held incidental to title over, trust property, present a particular risk profile. It will be argued that the institutional vulnerability of the express trust justifies the claim, and in particular, the priority of assurance provided by the claim, the strict liability it imposes upon a recipient, X, and its extension to traceable substitutes.

The significance of this thesis is twofold. First, it provides an accurate account of the event or legal reason that triggers the beneficiary's proprietary claim and the legal relations asserted by the claim. Second, this thesis identifies a novel role for equitable doctrine in controlling powers to give effect to equity's institutional commitment to the express trust.

C. Conceptual foundations

Having outlined the problem addressed in this thesis and this thesis' solution, this Part C will set out some conceptual foundations for the analysis in this thesis. Part C.1 will explain some key distinctions between the beneficiary's proprietary claim, and other equitable claims with which B's claim could be confused. Part C.2 will outline the taxonomical assumptions informing previous accounts of the claim, and Part C.3 will explain this thesis' approach to taxonomy.

1. The beneficiary's proprietary claim distinguished

Given the difficulty of precisely labelling and identifying the beneficiary's proprietary claim, it is important to be clear about what it is not, and the parameters of this thesis' scope of inquiry. This Part C.1 will briefly outline some distinctions between the beneficiary's proprietary claim, and other claims that may be available when property is misapplied from an express trust.

i. Knowing receipt

The first distinction is between knowing receipt³³ and the beneficiary's proprietary claim, a distinction that will be of continuing significance for this thesis. As has been explained by others³⁴ before, knowing receipt imposes certain aspects of the trust relationship on X, on the basis of X's receipt of trust property in circumstances where X has sufficient knowledge about the existence of the trust. The imposition of certain trustee duties on X permits a range of personal and proprietary claims as if X were an express trustee. This includes a proprietary claim against X for the recovery of trust property or its traceable substitute.³⁵ An important task for this thesis is to differentiate those cases concerning the proprietary claim in response to knowing receipt from the phenomenon of concern to this thesis, the beneficiary's proprietary claim. This will be addressed in more detail in Chapter 4.³⁶

The personal liability imposed upon X when she is a knowing recipient may have strategic value to B. This form of liability means that if X deals with the subject property in breach of her antecedent duty, she incurs further substitutive compensatory liability and reparative compensatory liability.³⁷ This personal claim will be of significance where X no longer retains the subject property, so that neither the beneficiary's proprietary claim, nor a proprietary claim based on knowing receipt, is available.

As has been repeatedly emphasised in cases,³⁸ knowing receipt and the beneficiary's proprietary claim are different phenomena, and what is true for one

³³ See generally: *Grimaldi* (n1) [252]–[254]; *Barnes v Addy* (1874) LR 9 Ch App 244; *Re Montagu's Settlement Trusts* [1987] 1 Ch 264, 276, 285; J Dietrich and P Ridge, *Accessories in Private Law* (CUP 2016) ch 7.

³⁴ See eg: C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) ch 4; S Worthington, 'Exposing Third-Party Liability in Equity' in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 347–48.

³⁵ *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 [81] (Lloyd LJ); *Williams v Central Bank of Nigeria* [2014] AC 1189 [31]; Mitchell and Watterson (n34) 135.

³⁶ Chapter 4, Part B.

³⁷ *Grimaldi* (n1) [252]–[254]; Mitchell and Watterson (n34) 117–38.

³⁸ *Grimaldi* (n1) [267] (the Court); *Fistar* (n10) [44] (Leeming JA); *Re Montagu's Settlement Trusts* (n33) 271–73; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All

may not be true for the other. Knowing receipt liability has been described as constructive trusteeship³⁹ in the sense that X is liable as if she were the express trustee. This sense of ‘constructive trust’ is different from the constructive trust that arises in response to the beneficiary’s proprietary claim, which refers to orders for relief that require X to deal with the property as necessary to facilitate its return to the trustee.⁴⁰

Critically, the ‘constructive trust’ that is awarded in cases of the beneficiary’s proprietary claim does not mean that X is subject to positive trustee duties like a knowing recipient, as Chapter 6 will demonstrate. That Chapter will also show that X’s liability to the beneficiary’s proprietary claim is *not* conditioned upon X’s knowledge. Further, the beneficiary’s proprietary claim, unlike knowing receipt, does not respond to a breach of duty by the trustee, as will be demonstrated by Chapter 5. We will return to this distinction in Chapters 2 and 6.

ii. *Black v Freedman* constructive trust

The second distinction is between the beneficiary’s proprietary claim and a claim based upon a ‘*Black v Freedman* constructive trust’,⁴¹ which refers to a thief’s liability as a constructive trustee in relation to the stolen property or its traceable proceeds. The parameters of, and rationale for, the *Black v Freedman* constructive trust remain unresolved.⁴² Despite these uncertainties, Leeming JA in *Fistar v Riverwood Legion & Community Club* stated, ‘[t]here can be no doubt that the position in Australia [is] ... that a thief holds stolen property on trust’.⁴³

As Chapters 3–6 will show, the beneficiary’s proprietary claim is distinct from a cause of action based on the *Black v Freedman* constructive trust. The beneficiary’s

ER 747, 758 (Millett J); *Nabb Bros Ltd v Lloyds Bank International (Guernsey) Ltd* [2005] EWHC 405 [69]–[72] (Lawrence Collins J).

³⁹ *Independent Trustee Services* (n35) [81] (Lloyd LJ); *Williams* (n35) [31]; Mitchell and Watterson (n34) 131–47.

⁴⁰ See further: *Giumelli v Giumelli* (1999) 196 CLR 101 [5] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

⁴¹ *Black v S Freedman & Co* (1910) 12 CLR 105; *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230 [154]–[156].

⁴² These issues are summarised in *Fistar* (n10) [36]–[39] (Leeming JA; Bathurst CJ agreeing).

⁴³ *Fistar* (n10) [39] (Bathurst CJ agreeing).

proprietary claim is not concerned with theft or fraud on the part of T or X. The *Black v Freedman* constructive trust is, however, conditioned upon a third party's theft or fraudulent conduct, and thus is clearly concerned with a phenomenon separate to that of the beneficiary's proprietary claim.

iii. Restitution of the value of property belonging to another

The third distinction is between the beneficiary's proprietary claim and a personal claim, recognised in law and equity, for restitution of the value of property.⁴⁴ The parameters of this claim are uncertain: for example, whether it is confined to the value of property *retained* by X at the time of trial,⁴⁵ or value of property *received*, even if no longer retained.⁴⁶ There is a further issue whether this claim is concerned with vindicating the claimant's proprietary rights, or reversing unjust enrichment.⁴⁷

Despite these uncertainties, it seems tolerably clear that this personal claim does not 'outflank' the distinct knowing receipt claim which requires X to account for property as if she were a trustee, as discussed above.⁴⁸ Further, and no matter whether personal claim is understood in terms of vindication of proprietary rights or unjust enrichment, it is fundamentally different from the beneficiary's proprietary claim. As will be shown in this thesis, the beneficiary's proprietary claim is not concerned with property 'belonging' to B, vindicating B's proprietary rights, or with the reversal of unjust enrichment.

iv. Derivative proceedings

Fourth are cases recognising that B, in special circumstances, may be permitted to bring proceedings that assert a right that accrues to T against a third party or other

⁴⁴ *Heperu* (n41) [143]–[155] (Allsop P); *Fistar* (n10) [36]–[51] (Leeming JA; Bathurst CJ agreeing); *Great Investments* (n10) [60]–[69] (the Court); K Mason, J Carter and G Tolhurst, *Mason and Carter's Restitution Law in Australia* (3rd edn, LexisNexis 2016) [311].

⁴⁵ The personal claim is confined to what X retains in: *Heperu* (n41) [143]–[155] (Allsop P); *Fistar* (n10) [36]–[51] (Leeming JA).

⁴⁶ The personal claim is *not* confined to the value of property retained in: *Great Investments* (n10) [60], see also [53] (the Court); J Edelman and E Bant, *Unjust Enrichment* (2nd edn, Hart Publishing 2016) 289–90.

⁴⁷ See further, Mitchell, Mitchell and Watterson, *Goff & Jones* (n26) [8-119]–[8-141]; Mason, Carter and Tolhurst (n44) [304]–[316].

⁴⁸ *Fistar* (n10) [29]–[56]; *Great Investments* (n10) [52]–[55]. See also: E Bant and M Bryan, 'Outflanking *Barnes v Addy*?' (2017) 11 J Eq 271.

beneficiary, sometimes referred to as ‘*Vandepitte* proceedings’.⁴⁹ The distinction between the beneficiary’s proprietary claim and derivative proceedings is critical to the analysis in this thesis. The distinction is made on the basis that the beneficiary’s proprietary claim asserts an equity for relief or ‘right’ that accrues to B.⁵⁰ The beneficiary’s proprietary claim is not a specific instance of derivative proceedings in which B is permitted to assert a right accruing to T. This is clearly demonstrated by the fact that the application of discretionary factors to B’s claim take account of B’s conduct rather than T’s conduct,⁵¹ as Chapter 8 will further demonstrate.

If B was asserting T’s equity for relief, then these discretionary factors would have been assessed by reference to T’s conduct not that of B. However, that is not the case, and the beneficiary’s proprietary claim asserts B’s equity for relief. We will return to these derivative proceedings, however, because sometimes T is permitted to assert the beneficiary’s proprietary claim on behalf of B; the significance of this will be considered further in Chapter 7.

v. Other proprietary claims

Finally, there is the distinction between the beneficiary’s proprietary claim, and other proprietary claims available in respect of other institutional arrangements, such as companies, agencies, partnerships and the administration of estates. There is a tendency in cases and academic commentaries to amalgamate these proprietary claims on the basis that they concern the abuse of fiduciary power.⁵² The premise of this approach is that other fiduciary relationships that concern the

⁴⁹ *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, 79; *Hayim v Citibank NA* [1987] AC 730, 748 (Lord Templeman). In Australia, this label is less frequently used; however, in substance the proceedings are the same, see further: *Alexander v Perpetual Trustees WA Ltd* (2004) 216 CLR 109 [55] (Gleeson CJ, Gummow and Hayne JJ).

⁵⁰ As recognised in: *Independent Trustee Services* (n35) [76]–[77], [101] (Lloyd LJ). See also: *Stuart v Kingston* (1923) 32 CLR 309, 334 (Higgins J), where some beneficiaries had subsequently ratified an unauthorised disbursement of trust funds, and only the other beneficiaries were able to maintain the beneficiary’s proprietary claim. This aspect was not questioned on appeal of the Privy Council in (1924) 34 CLR 394.

⁵¹ See eg: *Palmer v Monk* [1962] NSW 786, 790 (Jacobs J); *Shropshire Union* (n12) 509 (Lord Cairns), 512 (Lord Hatherley).

⁵² A small selection includes: *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 405 (Buckley LJ; Goff and Waller LJ agreeing), 406–07 (Goff LJ); *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 290, affd on appeal [1991] Ch 547, 567–68.

fiduciary's custody or power over property are analogous with an express trust. This analogy has been relied upon to treat the beneficiary's proprietary claim as part of one indistinguishable phenomenon across all custodial fiduciary relationships.⁵³

The distinctions between these proprietary claims, and the institutional contexts in which they arise, are issues to which this thesis will return in Chapters 9 and 10. It will be argued that some custodial fiduciary relationships, such as company or agency relationships, *cannot* be analogised with the express trust for the purposes of the beneficiary's proprietary claim. This is because these other institutions devolve power in a different way to the express trust and present different risk profiles. This thesis argues that we should take seriously the judicial warnings that '[i]t has not always been readily appreciated how misleading it is to describe directors as trustees'.⁵⁴ The beneficiary's proprietary claim is one instance where such an analogy is misleading.

2. Taxonomy

This Part C.2 outlines the taxonomical assumptions informing previous accounts of the beneficiary's proprietary claim. While there are important differences between these accounts, they all, to varying extents, accept a given taxonomical map of private law. Parts C.2.i–iii next explains this taxonomy with a view to showing that the main point of contention between these accounts relates to the composition of this taxonomy, and where the beneficiary's proprietary claim should be located within it. Part C.3 will explain that the analysis in this thesis does not adopt the same taxonomical map. However, this thesis does start from the same overarching assumption that legal relations should be explicable according to defined legal reasons or events.

i. Birksian taxonomy of events and responses

To varied extents, the taxonomy assumed by previous accounts of the claim, is that developed by Professor Peter Birks.⁵⁵ Professor Birks' taxonomy is a theoretical

⁵³ See eg: R Chambers and J Penner, 'Ignorance' in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co, 2008) 271, see also 273; *Lewin on Trusts* (n27) [7-018], [41-011].

⁵⁴ *Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd* [1987] FCA 603 [152] (Gummow J).

⁵⁵ See eg: P Birks, *An Introduction to the Law of Restitution* (OUP 1989) 28–54; P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWALR 1.

map of the intersections of particular legal relations (sometimes referred to as *responses*) and the events that give rise to them (*events*). Events and responses are the two primary dimensions of this taxonomy. Professor Birks classified the *events* as: (a) wrongs; (b) consent; (c) unjust enrichment; and (d) others. These events create *responses*, such as rights and correlating duties. Professor Birks classified responses as: (a) compensation; (b) restitution; (c) compulsion; (d) punishment; and (e) other.

One of the aims of Professor Birks' taxonomy is to map the relationship between particular events and responses. For example, the event of a wrong, which is a breach of a duty, can give rise to compensation or restitution. Restitution may also be a response to the event of unjust enrichment. As observed by Professor Birks, the taxonomy itself conceals a further classification of rights, the difference between *in personam* rights (rights against a person) and *in rem* rights (rights against specific property). We will return to the distinction between these rights in Chapter 2.

In part, the divisions in the previous accounts of the beneficiary's proprietary claim can be attributed to a lack of consensus about where on the Birksian taxonomy the beneficiary's proprietary claim exists and, further, about the composition of this taxonomy itself. The key divisions relate to: (i) the *event* considered relevant to the beneficiary's proprietary claim; and (ii) the nature of the *response*. These divisions are briefly outlined in Parts C.2.ii and C.2.iii, respectively.

ii. Divergence as to the event relevant to the beneficiary's proprietary claim

There are competing accounts of the event considered relevant to the beneficiary's proprietary claim, for example whether the claim arises in response to: (a) B's proprietary rights; (b) X's unjust enrichment; or (c) T's wrongdoing, each of which is discussed next.

a. B's claim is a response to B's proprietary rights

One account understands the beneficiary's claim in terms of a new event, not included by Professor Birks in his taxonomy, which is proprietary rights (*the proprietary rights account*).⁵⁶ Broadly speaking, this account understands the beneficiary's proprietary claim as a response to B's equitable title, whether that

⁵⁶ See n12.

title is understood as equitable ownership in particular, or in more general terms described variously as equitable proprietary rights or equitable title. As will be explained in more detail in Chapter 2, there are variations within this account. Despite these variations, the core idea is that B's claim 'vindicate[s]'⁵⁷ B's equitable proprietary rights against X by recognising an interest in B's favour which permits the return of specific property. The fundamental premise of this account is that B should have a claim to the trust property originally received by X or the traceable substitute, because B has equitable title.

b. B's claim is a response to unjust enrichment

Another account understands the beneficiary's proprietary claim as a response to the event of unjust enrichment (*the unjust enrichment account*).⁵⁸ This account distinguishes between B's claim to the *property originally received by X* and the *traceable substitute of the original*. Unjust enrichment scholars agree that B's claim to the original property is the vindication of proprietary rights and can be understood in terms of the miscellaneous 'other' category of events in the Birksian taxonomy.⁵⁹ The claim against the traceable substitute, on the other hand, is considered to be an instance of unjust enrichment rather than proprietary rights.⁶⁰

In canvassing the unjust enrichment account, it is important to be clear about how this thesis uses the term 'unjust enrichment' and to acknowledge some analytical instabilities facing unjust enrichment in Australian law. 'Unjust enrichment' is used in this thesis to describe a category of causative events that gives rise to restitutionary rights and obligations, and sits alongside other categories of events, such as wrongs.

In England, unjust enrichment is recognised as referring to an independent cause of action and source of rights and obligations.⁶¹ In Australia, however, the role of

⁵⁷ *Foskett* (n1) 129 (Lord Millett).

⁵⁸ See n26.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ See eg: *Banque Financière de la Cité v Parc (Battersea Ltd)* [1999] 1 AC 221, 227 (Lord Steyn), 234 (Lord Hoffman); *Benedetti v Sawiris* [2013] UKSC 50 [10] (Lord Clarke; Lord Kerr and Lord Wilson agreeing); *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 [18] (Lord Clarke; Neuberger P, Lord Kerr and Lord Wilson agreeing).

unjust enrichment is less clear. Unjust enrichment is not a cause of action, and has been recognised as having a taxonomical function or an organising role.⁶² In *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd*, Hayne, Crennan, Kiefel, Bell and Keane JJ stated that ‘unjust enrichment, is inconsistent with the law of restitution as it has developed in Australia’,⁶³ and that the availability of restitution depends instead on ‘equitable principles’.⁶⁴ The continuing role of unjust enrichment, and the equitable principles that determine when restitution is available, are yet to be finalised by Australian apex courts. Some cases⁶⁵ since *Australian Financial Services & Leasing* have emphasised the role of equitable principle. Edelman J in *Lampson (Aust) Pty Ltd v Fortescue Metals Group Ltd (No 3)* expressed the view that principles of unjust enrichment can inform those equitable principles.⁶⁶

It is important to acknowledge this uncertainty in the Australian law of restitution; however, it is not necessary for this thesis to engage further with this issue, because, on this thesis’ account, the beneficiary’s proprietary claim is not concerned with the event of unjust enrichment.

⁶² See eg: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 378–79 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 406 (Dawson J); *Farah Constructions* (n6) [151] (the Court); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 [83]–[85] (Gummow, Hayne, Crennan and Kiefel JJ); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 [85]–[95]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 [29]–[30]. There is extensive academic literature on this topic, see eg: Edelman and Bant, *Unjust Enrichment* (n46) 120–21; Mason, Carter and Tolhurst (n44) [123]; K Mason, ‘Strong Coherence, Strong Fusion, Continuing Categorical Confusion: The High Court’s Latest Contributions to the Law of Restitution’ (2015) 39 ABR 284; J Ward, ‘What’s in a Name? The Taxonomical and Conceptual Divide between Unjust Enrichment and Equity’ (Current Legal Issues seminar, University of Queensland, 13 June 2019).

⁶³ *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁶⁴ *Australian Financial Services & Leasing* (n63) [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁶⁵ See eg: *Southage Pty Ltd v Vescovi* [2015] VSCA 117 [48]–[49] (the Court); *Diao v Cohen* [2016] NSWSC 96 [62]–[65] (Lindsay J).

⁶⁶ *Lampson (Aust) Pty Ltd v Fortescue Metals Group Ltd (No 3)* [2014] WASC 162 [50]–[55].

c. *B's claim is a response to wrongdoing*

A third account understands the beneficiary's proprietary claim for restitution as a response to T's wrongdoing.⁶⁷ A wrong is a breach of a duty owed to another at common law or equity.⁶⁸ Wrongdoing 'operates as a licence to the law to mistreat the wrongdoer'.⁶⁹ Some scholars have argued that the event relevant to the beneficiary's proprietary claim is a breach of duty by T. This thesis takes a different position, and Chapter 5 will demonstrate that the beneficiary's proprietary claim does not respond to wrongdoing in the sense of a breach of duty by T.

iii. The response to B's claim

Finally, the response. The beneficiary's proprietary claim has so far been understood as a claim that asserts B's right, and X's correlative duty, to make *restitution* as that term is used to denote a specific category of taxonomical response.⁷⁰ It must be acknowledged that there are different meanings of restitution⁷¹ and analytical instability about whether a given legal relationship, and ensuing court order, are properly understood as restitution. Further, there is debate about whether restitution should be confined to orders that reverse the transfer of value or can extend to orders requiring the return of specific property. To the extent that the category of restitution as a response is confined to *duty-right* relations that require a defendant to give back value, then the analysis in this thesis might tend *against* the view that the response to the beneficiary's proprietary claim should be located within this category. Chapter 4 will demonstrate that X is not always subject to orders requiring her to transfer title to property or pay its value. Further, Chapter 6 will show that X is not subject to a *duty* to make restitution, and B does not have a correlative right to restitution.

Resolution of the bounds of the category of restitution is beyond the scope of this thesis. The aim of this thesis is to understand the beneficiary's proprietary claim

⁶⁷ See n27.

⁶⁸ P Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1, 31.

⁶⁹ *ibid* 33.

⁷⁰ As in: *Foskett* (n1) 127–29 (Lord Millett); *Millett* (n12) 313–14; *Virgo* (n12) 11–18, 562–63; Birks, 'Receipt' (n14) 218–19.

⁷¹ As summarised in: Edelman and Bant, *Unjust Enrichment* (n46) ch 3.

according to its own terms and irrespective of the taxonomical labels typically ascribed to the response to the claim.

3. Approach in this thesis

As set out in Part C.2 above, previous accounts of the beneficiary's proprietary claim attempt to locate it within a given taxonomical framework. This thesis takes a different approach in that it does not seek to understand the claim according to the defined set of events identified by Professor Birks' or the additional event of proprietary rights. Having said that, this thesis does accept the overarching task and method of the Birksian taxonomy, relevantly that the law should be intelligible and defensible according to a rational and predictable model that explains what legal relations arise in response to a defined set of reasons or events.⁷² What this thesis takes issue with is the reason or event identified as triggering the beneficiary's proprietary claim, and the form of response.

In relation to the *response*, and as explained above in Part C.2.iii, this thesis does not aim to resolve whether the legal relations asserted by the beneficiary's proprietary claim should be understood as falling within the taxonomic category of restitution. Rather, it aims to identify precisely what legal relations are asserted by the claim, for example whether X is subject to a *duty* or a *liability*, and the content of those legal relations which define what X is required to do.

In relation to the *event*, this thesis parts company with the strict Birksian taxonomy according to which the claim is triggered by unjust enrichment, wrongdoing or some other event. Further, this thesis rejects later modifications of the Birksian taxonomy that understand the claim as being triggered by proprietary rights. The Birksian scheme of events, in its original or modified forms, cannot provide a rational and defensible explanation of the claim as the claim is evidenced in the cases.

Nonetheless, this thesis' analysis adopts the task of identifying the reason or event that triggers the beneficiary's proprietary claim. The thesis will argue that the legal relations asserted by the beneficiary's proprietary claim arise in response to a new event, labelled in this thesis a 'non-compliant execution'. A non-compliant

⁷² Birks, *An Introduction to the Law of Restitution* (n55) 1–8; Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (n55) 4–6, 22–25.

execution occurs when there is an exercise of power held subject to an express trust but that exercise is not in accordance with the trust terms, for a proper purpose, or bona fide. The response is B's equity for relief, and X's liability to those court orders necessary to place B and the trust estate in the position, or near enough to it, so that it is as if the non-compliant execution had not occurred.

The analysis in this thesis will draw upon the conceptual frameworks developed by other private law scholars⁷³ such as Professor Hohfeld and Professor Austin. However, these frameworks are only used to the extent that they provide useful analytical tools to describe the operation and effect of the claim. Critically, this thesis does not attempt to fit the beneficiary's proprietary claim within these conceptual frameworks, and where necessary these frameworks will be refined to accommodate the operation and effect of the claim as it is evidenced by the cases.

4. Significance of this thesis' inquiry

One of the aims of this thesis is to identify, precisely, the legal event or reason relevant to the beneficiary's proprietary claim. In saying that, it is acknowledged that the significance of this inquiry has been questioned. Professor Lionel Smith has suggested that it does not matter whether the beneficiary's proprietary claim is understood as based on proprietary rights or unjust enrichment.⁷⁴

Professor Smith's argument does not, however, undermine the significance of this thesis' inquiry. Professor Smith's argument assumes that the current taxonomical framework *can* explain the beneficiary's proprietary claim. With respect, this assumption is incorrect. As this thesis will show, the beneficiary's proprietary claim *cannot* be understood in terms of property or unjust enrichment, or in terms of other suggestions such as wrongdoing or third-party interference. The issue of the event relevant to the beneficiary's proprietary claim has a much greater scope and significance than the contest between these previous accounts. The claim is not concerned with an interpersonal sense of justice between B and X; rather, it forms part of equity's institutional commitment to the express trust.

⁷³ J Austin, *Lectures in Jurisprudence* (R Campbell ed, 3rd edn, 1869) 794–96; W Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16; Birks, 'Rights, Wrongs and Remedies' (n68).

⁷⁴ L Smith, 'Unravelling Proprietary Restitution' (n29) 331.

D. Chapter-by-chapter outline

The arguments in this thesis will proceed as follows.

Chapter 2 will demonstrate that the proprietary rights account cannot explain or justify the beneficiary's proprietary claim. The Chapter will also commence this thesis' arguments in relation to the unjust enrichment account of the beneficiary's proprietary claim.

Chapter 3 begins this thesis' account of the beneficiary's proprietary claim. The aim of the Chapter is to demonstrate the existence and normative significance of the event according to which the beneficiary's proprietary should be understood, referred to as a non-compliant execution.

Chapter 4 will demonstrate that the beneficiary's proprietary claim responds to a non-compliant execution. It will also show that the claim recognises an equity for relief necessary so that it is as if the non-compliant execution had not occurred.

Chapter 5 will demonstrate that the claim is not a response to wrongdoing, such as a breach of a trustee or fiduciary duty.

Chapter 6 will set out the nature of, and conditions for, X's responsibility, which include the extension of the claim to traceable substitutes and remote recipients. The Chapter will demonstrate that the claim is not conditioned upon X's wrongdoing, interference or knowledge, and address some of the justificatory implications arising from X's strict responsibility.

Chapter 7 will consider the identity of the party to whom the equity for relief asserted by the beneficiary's proprietary claim accrues. It will also demonstrate that the claim is available irrespective of the nature of B's entitlement under an express trust, and that it is also available to T and someone interested in a charitable trust.

Chapter 8 will consider the range of defences and denials applicable to the beneficiary's proprietary claim. It will demonstrate the role of equitable discretion in relation to the beneficiary's proprietary claim and consider the availability of the 'change of position' defence.

Chapter 9 will set out this thesis' account of the function of, and justification for, the beneficiary's proprietary claim.

Chapter 10 will consider the implications of this thesis' arguments for the previous accounts of the beneficiary's proprietary claim. In particular it will demonstrate that the unjust enrichment account, accounts based upon 'lack of authority', and third-party interference, fail to explain the claim. The Chapter will also explain why the defence of change of position should not apply to the beneficiary's proprietary claim.

Chapter 11 will conclude this thesis with an overview of the thesis' solution and a summary of its key contributions to our understanding of the beneficiary's proprietary claim, and equity's regulation of institutional power.

Chapter 2 – The limits to equitable title

A. Introduction

The aim of this Chapter is to demonstrate a flaw common to two of the previous accounts of the beneficiary's proprietary claim: the 'proprietary rights account' and the 'unjust enrichment account'. That flaw is a reliance on equitable title (variously expressed in terms of equitable ownership or equitable proprietary rights) as a normative fulcrum. In pointing out this flaw, it is acknowledged that the rhetoric of equitable title is afforded weight in Australian and English cases¹ concerning the beneficiary's proprietary claim, and in some academic scholarship as well.² For example, some cases justify the beneficiary's proprietary claim on the basis that B is the 'real'³ or 'true'⁴ owner of trust property. In *Shropshire Union v R*, Lord Hatherley stated '[i]n the Eye of the Court of Equity, the *cestuis que trust* ... are the owners of the property',⁵ and in *Foskett v McKeown*, the beneficiary's proprietary claim was understood as the vindication of proprietary rights.⁶

The aim of this Chapter is to explain why reliance on equitable title is flawed, and to set out the implications for the proprietary rights account and unjust enrichment account. This thesis' position has not been taken lightly, not the least due to the

¹ A sample includes: *Strang v Owens* (1925) 42 WN (NSW) 183, 184–85 (Street CJ), 185 (Owen J); *Hagan v Waterhouse* (1991) 34 NSWLR 308, 369–70 (Kearney J); *Chong v Chanell* [2009] NSWSC 765 [28] (Brereton J); *Re Diplock* [1948] Ch 465, 522; *Boscawen v Bajwa* [1996] 1 WLR 328, 334.

² R Grantham and C Rickett, 'Property Rights as a Legally Significant Event' (2003) CLJ 717, 728–34; P Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 313–17; J Penner 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (2014) 26 CJLJ 473; G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 11–18, 559–65; L Tucker, N Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) [41-057]; K Mason, J Carter and G Tolhurst, *Mason and Carter's Restitution Law in Australia* (3rd edn, LexisNexis 2016) [313].

³ *Shropshire Union v R* (1865) LR 7 HL 496, 506 (Lord Cairns LC), 511 (Lord Hatherley), see also 507–08 (Lord Cairns LC).

⁴ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 [251] (the Court).

⁵ *Shropshire Union* (n3) 511, see also 506 where Lord Cairns stated: 'the beneficiary of the trust is the "real beneficial owner" whose title binds third parties dealing with the trustee'.

⁶ *Foskett v McKeown* [2001] 1 AC 102, 115 (Lord Hoffman), 127–29 (Lord Millett).

weight afforded equitable title in the cases. However, for the reasons set out in this Chapter, it is submitted that equitable title should no longer be relied upon to understand the beneficiary's proprietary claim. In summary, the main argument of this Chapter is that reliance by the proprietary rights account on equitable title to justify the beneficiary's proprietary claim involves circular reasoning. Properly understood, equitable title is a descriptive 'metaphor'⁷ that is a conclusion and not a source of reason.

Finally, this Chapter foreshadows how the limits to equitable title have implications for the unjust enrichment account: in particular, that the unjust enrichment account leverages off B's equitable title as a normative fulcrum and thus suffers the same error as identified in relation to the proprietary rights account.

The arguments in this Chapter will proceed as follows. Part B will outline the proprietary rights account of the beneficiary's proprietary claim. Part C will explain why that account is based on circular reasoning and is thus flawed. Part D will consider the implications of this Chapter's arguments for the unjust enrichment account of the beneficiary's proprietary claim.

B. The proprietary rights account

1. Proprietary rights account – outline and variations

The aim of this Part B is to explain how the proprietary rights account relies upon B's equitable title as the justificatory source for the beneficiary's proprietary claim. The proprietary rights account begins with the assumption that B does have *proprietary* rights in the sense that it is possible to treat B as the equitable analogue of a holder of proprietary title at law. This assumption is evident in cases⁸ that justify B's claim on the basis she is the 'true'⁹ or 'real'¹⁰ owner of that property, as

⁷ See also: P Matthews, 'From Obligation to Property and Back Again' in D Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer Law International 2002) 203, 206–13; L Smith, 'Unravelling Proprietary Restitution' (2004) 40 CBLJ 317, 319; L Smith, 'Trust and Patrimony' (2008) 38 RGD 379, 392.

⁸ See also: *Strang* (n1) 184–85 (Street CJ), 185 (Owen J).

⁹ *Grimaldi* (n4) [251] (the Court).

¹⁰ *Shropshire Union* (n3) 506 (Lord Cairns LC), 511 (Lord Hatherley).

for example in *Grimaldi v Chameleon Mining NL (No 2)*¹¹ and *Foskett v McKeown*.¹²

The core theme is that the claim is available because B has equitable title.

There are differing views within the proprietary rights account as to the precise elements of the beneficiary's proprietary claim, although, in one way or another, all these views rely upon B having a proprietary interest to justify her claim to the original and traceable substitute. The point of difference within the proprietary rights account relates to the content of B's equitable title, that is whether B's proprietary interest is: (i) an equitable proprietary *interest or right*;¹³ or (ii) equitable or beneficial *ownership*.¹⁴ The difference is immaterial to this thesis' arguments. On either approach, the *proprietary* nature of B's interest justifies the beneficiary's proprietary claim. The normative assumption underpinning all variants is 'the fundamental principle of English law that property rights are of such importance that they are deserving of particular protection'.¹⁵

This thesis does not challenge the importance of protection for proprietary rights. Rather, for reasons discussed in Part C below, what is in dispute is the assumption that the beneficiary's proprietary claim protects and responds to proprietary rights in the first place. One of the main submissions of this thesis is that the claim is concerned with controlling powers held subject to an express trust, not the protection or vindication of B's 'proprietary' interest.

Another variation within the proprietary rights account relates to the legal event identified as relevant to the claim, whether that be B's proprietary rights, an unauthorised dealing with B's proprietary rights, or X's infringement of (or breach of duty to not interfere with) B's proprietary rights. According to Professor Virgo, for example, B's claim against X is justified on the basis that X 'has interfered with [B's] ... property rights'.¹⁶ Professor Nolan conditions the availability of the

¹¹ *Grimaldi* (n4) [251] (the Court).

¹² *Foskett* (n6) 115 (Lord Hoffman), 127 (Lord Millett).

¹³ See eg: *Foskett* (n6) 115 (Lord Hoffman), 127 (Lord Millett).

¹⁴ See eg: *Strang* (n1) 184–85 (Street CJ), 185 (Owen J); *Grimaldi* (n4) [251] (the Court); *Shropshire Union* (n3) 507–08 (Lord Cairns LC).

¹⁵ Virgo (n2) 16.

¹⁶ *ibid* 15. See also: Grantham and Rickett (n2) 732.

beneficiary's proprietary claim on X's infringement of B's proprietary right.¹⁷ Despite the difference in relation to the definition of the event, both of these views leverage off the *proprietary* nature of B's interest to explain and justify the beneficiary's proprietary claim.

Another variant is given by Professor Jaffey,¹⁸ who focuses upon the unauthorised nature of T's conduct rather than X's interference with or infringement of B's proprietary rights. This is only a superficial shift in focus, given Professor Jaffey's reliance upon the proprietary nature of B's interest to explain why the law should respond to an unauthorised transaction. In Chapters 3, 9 and 10, this thesis will return to the idea of an unauthorised transaction which, as we will see, can have multiple meanings. The relevant point for now is that Professor Jaffey's account relies on the *proprietary* nature of B's interest¹⁹ to justify B's claim. Professor Jaffey explains that B, like any other titleholder, should only be bound to transactions to which she properly consents, and conversely should have a right to restitution of property where she did not consent to its transfer.²⁰ Again, B's equitable title is the normative fulcrum.

2. Overreaching

The final facet of the proprietary rights account is that the beneficiary's proprietary claim is conditioned on overreaching.²¹ *Overreaching* in this context refers to a

¹⁷ R Nolan, 'Equitable Property' (2006) 122 LQR 232, 233–35.

¹⁸ P Jaffey, 'Explaining the Trust' (2015) 131 LQR 377, 389, 395.

¹⁹ In some places Jaffey characterises B's interest as beneficial ownership, see eg: Jaffey, 'Explaining the Trust' (n18) 389–95; P Jaffey, 'Proprietary Claims to Recover Mistaken or Unauthorised Payments' in P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2018) ch 4; but elsewhere as a proprietary right, see eg: Jaffey, 'Explaining the Trust' (n18) 389–95, without distinguishing between these particular and more general terms respectively.

²⁰ Jaffey (n18) 399. See further, P Jaffey, *Private Law and Property Claims* (Hart Publishing 2007) 155–65.

²¹ See generally: *Clay v Clay* (2001) 202 CLR 410 [51] (the Court); *Akers v Samba Financial Group* [2017] AC 424 [51] (Lord Mance); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 [76]–[77], [101] (Lloyd LJ); C Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' (1990) 49 CLJ 277; D Fox, 'Overreaching' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) ch 4; D Fox, 'Priorities' in J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) [4-013]; *Lewin on Trusts* (n2)

power created by the trust terms, which may be held by T or a donee of power, D, to: (i) subordinate or extinguish B's existing interest under a trust in favour of X in relation to specific trust property transferred to X; and (ii) transmit B's existing interest under the trust to any substitute property acquired from X.²² Overreaching and the beneficiary's proprietary claim are considered by the proprietary rights account to be mutually exclusive phenomena. Overreaching extinguishes B's proprietary interest that is asserted and vindicated by the beneficiary's proprietary claim.

As this thesis will show, the beneficiary's proprietary claim does not assert or vindicate B's pre-existing interest under a trust. B's claim is not available *because* of a failure to overreach. On this thesis' account, the claim, and the *new* interest asserted by it, arise in response to a non-compliant execution. As will be explained in Chapter 10, overreaching and the beneficiary's proprietary claim are mutually exclusive phenomena, albeit for reasons different to those previously assumed by the proprietary rights account.

3. Trustee's performance is given proprietary protection against third-party interference

A different account of the beneficiary's proprietary claim is provided by Professor Lionel Smith, who, broadly speaking, understands the beneficiary's proprietary claim as protecting against X's interference with T's performance of her trustee obligations.²³ On Professor Smith's account, B's claim against X is the result of

[41-012]–[41-013]; R Nolan, 'Property in a Fund' (2004) 120 LQR 108, 113–14; R Nolan, 'Vandervell v IRC: A Case of Overreaching' (2002) 61 CLJ 169, 172–74.

²² *ibid.* Overreaching powers are also conferred by statutes, which grant a power to transfer title to a purchaser of a legal estate in land free of a prior equitable interest, see eg: Law of Property Act 1925 (Eng) s 2. See generally: *State Bank of India v Sood* [1997] Ch 276, 281 (Gibson LJ); Harpum (n21).

²³ See eg: L Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412, 429–30, 435; L Smith, 'Transfers' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 120–23, 136–38; Smith, 'Unravelling Proprietary Restitution' (n7) 321–27; Smith, 'Trust and Patrimony' (n7) 391–92; L Smith, 'Philosophical Foundations of Proprietary Remedies' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of Unjust Enrichment* (OUP 2009) ch 10.

equity taking a ‘wide view of the effect of an obligation’,²⁴ and not equity’s modification of the law of property. Professor Smith identifies the rationale for B’s claim as being that ‘[i]t is wrong to get in the way of the performance of other people’s obligations’.²⁵ According to Professor Smith, there is a stronger analogy for the claim and interference in breach of contract than in breach of proprietary rights.²⁶

Chapter 10 will set out this thesis’ reasons why the beneficiary’s proprietary claim should not be understood as protecting against X’s interference with T’s performance. What is significant about Professor Smith’s account for the analysis in this Chapter 2 is that some aspects of this account might be understood to rely upon the proprietary nature of B’s interest. For example, Professor Smith has argued that it is B’s equitable ownership or title that provides the sufficient justificatory link or nexus between B and X where X is a remote recipient. According to this argument, the beneficiary’s proprietary claim to the original or traceable substitute in cases like *Foskett v McKeown* can only be justified as ‘the outcome of a (logically contingent) decision about how robustly ownership rights will be protected’.²⁷ If this understanding is correct then, again, B’s ‘proprietary’ interest is treated as a source of normative input, at least in this limited respect.

Pausing here, it is necessary to note that, according to Professor Smith, the beneficiary’s proprietary claim extends against X some aspects of the initial trust relationship between T and B.²⁸ This thesis takes a different position as to the operation and effect of the claim, and Chapter 6 will demonstrate that it does not represent the extension against X of any part of the initial trust relationship between B and T. This Chapter 2, however, is concerned with demonstrating how

²⁴ Smith, ‘Philosophical Foundations of Proprietary Remedies’ (n23) 290.

²⁵ *ibid* 292.

²⁶ Smith, ‘Unravelling Proprietary Restitution’ (n7) 321.

²⁷ L Smith, ‘Restitution: The Heart of Corrective Justice’ (2001) 79 *Tex L Rev* 2115, 2159, 2156–58. See also: Smith, ‘Unravelling Proprietary Restitution’ (n7) 326.

²⁸ See also: B McFarlane and R Stevens, ‘The Nature of Equitable Property’ (2010) 4 *J Eq* 1, 5; S Agnew and B McFarlane, ‘The Paradox of the Equitable Proprietary Claim’ in S Agnew and B McFarlane (eds), *Modern Studies in Property Law* (10th edn, Hart Publishing 2019) ch 17. Note, however, that these accounts are directed to the operation and effect of the claim, and not to the question of more relevance to this Chapter 2, which is the reason *why* it exists.

reliance upon the analogy of equitable title cannot provide a sufficient justification for the existence of the claim, for the reasons set out in Part C next.

C. Flawed reliance on equitable title

The discussion above has demonstrated how the proprietary rights account treats B as if she is the owner of property, or has other proprietary rights, and reasons that B should have the proprietary claim because she has proprietary rights. This Part C explains why that reliance on equitable proprietary rights is circular and thus problematic.

To do this, the arguments in this Part C will proceed as follows. Part C.1 will distinguish between B's interest under an express trust against T, and the interest asserted by the beneficiary's proprietary claim against X. Part C.2 will demonstrate that B's interest against T is not ownership or a proprietary right, and explain that it may, however, sometimes be analogised with ownership or a proprietary right. Part C.3 will demonstrate that B's interest against X as asserted by the beneficiary's proprietary claim, is *not* a true proprietary right, but can be analogised with proprietary rights. Part C.4 will explain the implications of these arguments for the proprietary rights account.

1. B's interests distinguished

This Part C.1 outlines B's interests under an express trust and distinguishes between: (i) B's interest against T; and (ii) B's interest against X as asserted by the beneficiary's proprietary claim. While this distinction is not without controversy, and will require further argument in Chapter 6, this thesis takes the position that these interests are distinct. These interests, and the basis for their distinction, are discussed now.

i. B's interest against T

It is uncontroversial that B's interest under an express trust comprises B's right to T's performance of T's personal obligation to deal with trust property in accordance with the trust terms.²⁹ This interest is understood to be 'engrafted' or 'annexed' to

²⁹ *DKLR Holding Co (No 2) Pty Ltd v Comr Stamp Duties* [1980] 1 NSWLR 510, 518–19; *Spellson v George* (1987) 11 NSWLR 300, 315–16; *Akers* (n21) [82] (Lord Sumption).

T's title to the trust property.³⁰ This interest can be described as a 'beneficial interest ... *in the trust assets*', '*inasmuch as a court of equity will aid the beneficiaries in the enforcement of the terms of trust*'.³¹ B can enforce her interest against T, despite T's death or insolvency/bankruptcy.³² Although, B's interest will be deferred in priority to T's right to be indemnified for properly incurred expenses, whether by way of exoneration or reimbursement.³³ Finally, B's interest can be transmitted from the property originally subject to the express trust, to the substitute property that T acquires.³⁴

There is some debate about how B's interest against T is annexed or engrafted to the trust property, in particular whether B's interest is affixed to the specific property or T's rights to that property.³⁵ Owing to these uncertainties, this thesis will simply refer to the complex of these legal relations between T, B and the trust property as '***B's interest against T***'. It is not necessary for this thesis to resolve these issues because B's interest against T cannot explain or justify the beneficiary's proprietary claim, for the reasons set out in Part C.2 below.

³⁰ *DKLR Holding Co* (n29) 518–19; *FCT v ElecNet (Aust) Pty Ltd* (2015) 239 FCR 359 [85] (Pagone and Edelman JJ); *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20 [25]–[27] (Kiefel CJ, Keane and Edelman JJ).

³¹ *Carter Holt Harvey Woodproducts* (n30) [82] (Bell, Gageler and Nettle JJ) (emphasis added).

³² See eg: *Carter Holt Harvey Woodproducts* (n30) [25]–[27] (Kiefel CJ, Keane and Edelman JJ); *Space Investments Ltd v CIBC Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072, 1074; *Foskett* (n6) 127 (Lord Millett); Bankruptcy Act 1966 (Cth) s 116(2)(a); Succession Act 2006 (NSW) s 4(5); Probate and Administration Act 1898 (NSW) s 45. Note that there is not a parallel provision for insolvency in the Corporations Act 2001 (Cth); nonetheless, it is 'elementary and fundamental' that property held on trust by a company is *not* available for distribution on insolvency: *Carter Holt Harvey Woodproducts* at [26] (Kiefel CJ, Keane and Edelman JJ).

³³ *Carter Holt Harvey Woodproducts* (n30) [28]–[33] (Kiefel CJ, Keane and Edelman JJ), [80]–[83] (Bell, Gageler and Nettle JJ).

³⁴ *Re Hallett's Estate* (1880) 13 Ch D 696, 719; *Space Investments* (n32) 1073–74; *Foskett* (n6) 127.

³⁵ See eg: B McFarlane and R Stevens, 'The Nature of Equitable Property' (n28); J Edelman, 'Two Questions for the Law of Trusts' (2013) 129 LQR 66; J Penner 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (n2).

ii. B's interest against X as asserted by the beneficiary's proprietary claim

Next, there is B's interest *against X*, which is asserted by the beneficiary's proprietary claim, referred to as '**B's interest against X**'. At this stage, it is necessary to engage with some uncertainty whether the beneficiary's proprietary claim should be understood as the transmission against X of B's interest against T, discussed above in Part C.1.i, or rather, as a distinct and new interest against X, and to explain this thesis' reasons for treating these interests as distinct.

The position taken in this thesis is that B has, at least, two distinct interests under an express trust. This position was summarised by Lord Sumption in *Akers v Samba Financial Group*, who stated that B has:

two main legal rights. First, [B has] ... a right to have the trust administered according to its terms. This was a personal right against the trustee. ... Secondly, [B has] ... a true proprietary right. ... An equitable interest possesses the essential hallmark of any right in rem, namely that it is good against third parties into whose hands the property or its traceable proceeds may have come.³⁶

The first interest is B's interest against T, discussed in Part C.1.i above. This thesis is concerned with the second interest identified by Lord Sumption, which is the interest asserted by the beneficiary's proprietary claim against X.

Contrary to this thesis' position is the view that the beneficiary's proprietary claim represents the transmission or persistence *against X* of a limited aspect of B's interest against T.³⁷ On this view, the initial relationship between T and B can have an effect upon X, namely that X is subject to 'a duty not to use his ownership of the [subject property] ... for his own benefit'.³⁸

With respect, it is submitted that this cannot be true. The content of B's interest against T is very different to the interest against X that is asserted by the beneficiary's proprietary claim. Chapter 6 will show that the interest asserted by

³⁶ *Akers v Samba Financial Group* [2017] AC 424 [82] (citations omitted). See also: M Bryan, 'The Liability of the Recipient' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 330–31; C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [8-158], [8-161]–[8-162].

³⁷ See eg: B McFarlane, 'Equity, Obligations and Third Parties' [2008] SJLS 308, 318–22; McFarlane and Stevens (n28) 5; Agnew and McFarlane (n28) 2–3; J Penner, *The Law of Trusts* (3rd edn, Butterworths 2002) 32.

³⁸ B McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 31.

the beneficiary's proprietary claim is not the same as B's right to performance of T's duty to not use trust property for her own benefit. B has an equity for relief, and X, a corresponding liability to court orders. Prior to any court order being made, X does *not* owe a duty to B to not use property for X's benefit. This thesis' position is supported by Lord Sumption's statement set out above and is the position taken by other academics as well.³⁹

Finally, it may well be that other doctrines, such as knowing receipt, have the effect of transmitting B's interest against T to X in the sense that X is accountable as a constructive trustee. The distinction between knowing receipt and the beneficiary's proprietary claim was introduced in Chapter 1, and we will return to it in Chapter 6. The point for now is that, irrespective of the operation and effect of knowing receipt, the beneficiary's proprietary claim does not transmit B's interest against T to X.

The conclusion from this discussion is that the interest asserted by the beneficiary's proprietary claim against X is separate from the set of legal relations existing between B and T referred to generally in this thesis as B's interest against T. The analysis in this thesis has not yet identified the precise content of B's interest against X, which is the focus of Chapter 6. Yet, even without a precise account of the content of this interest, it is possible to show in the following Parts that it is not a true proprietary right capable of supporting the proprietary rights account or unjust enrichment account.

2. B's interest against T cannot explain or justify B's claim

This Part C.2 demonstrates that B's interest *against T* cannot explain or justify the beneficiary's proprietary claim. This is for three reasons: (i) B's interest against T is not true ownership (Part C.2.i); (ii) the metaphor of equitable ownership fails to account for the full spectrum of cases in which the beneficiary's proprietary claim is available (Part C.2.ii); and (iii) the 'proprietary' nature of B's interest, cannot account for the claim (Part C.2.iii).

³⁹ See n36. See also: S Worthington, 'Exposing Third-Party Liability in Equity' in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 349–50.

i. B's interest against T is not true ownership

As mentioned above in Part B.1, B has been described as the 'true' or 'real' owner of trust property. However, it is T who is the owner of trust property.⁴⁰ *Ownership* is the most absolute or the greatest interest in property⁴¹ and encapsulates a bundle of proprietary rights or incidents; these include, for example, the right to possession, the right to use, the right to income, the right to exclude third parties, and the ability to assign.⁴² B's interest against T is not ownership in this sense. References to B being the 'true', 'real' or 'equitable' owner of property are rather metaphorical.⁴³

The ownership metaphor is applicable when B's interest under an express trust exhibits certain features.⁴⁴ One feature that permits ascription of equitable ownership to *describe* B's interest against T is that B has an interest in relation to specific property that is enforceable against, and allows B to exclude, third parties.⁴⁵ In B's case this is satisfied by the availability of the beneficiary's proprietary claim.

As has been explained in more detail elsewhere,⁴⁶ another necessary feature that permits ascription of equitable ownership to *describe* B's interest against T is that B (or a closed class of beneficiaries in the case of an exhaustive discretion⁴⁷) has an

⁴⁰ *Carter Holt Harvey Woodproducts* (n 30) [82] (Bell, Gageler and Nettle JJ).

⁴¹ A Honoré, 'Ownership' in A Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) 108; *Gatward v Alley* (1940) 40 SR (NSW) 174, 178 (Jordan CJ); *Kent v SS Maria Luisa (No 2)* (2003) 130 FCR 12, 33 (Tamberlin and Hely JJ); R Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433.

⁴² Professor Honoré lists 11 incidents of ownership, which are: (i) the right to possess; (ii) the right to use; (iii) the right to manage; (iv) the right to the income; (v) the right to the capital; (vi) the right to security; (vii) the incident of transmissibility; (viii) the incident of absence of term; (ix) the duty to prevent harm; (x) liability to execution; (xi) residuary character: (n41) 113–15.

⁴³ As recognised by scholars before, see eg: SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) 6; Smith, 'Trust and Patrimony' (n7) 392.

⁴⁴ As recognised in *Carter Holt Harvey Woodproducts* (n30) [82] (Bell, Gageler and Nettle JJ) (emphasis added).

⁴⁵ See eg: S Worthington, *Equity* (2nd edn, OUP 2006) 65–67.

⁴⁶ J Hudson, 'Equitable Ownership and Restitution of Misapplied Trust Property' (2017) 11 J Eq 245.

⁴⁷ Where the trustee has a discretionary power that is exhaustive and the trustee has a duty to distribute to beneficiaries within a closed class, then, together, the beneficiaries have an

absolute entitlement to the benefit of trust property.⁴⁸ It is uncontroversial that this is a necessary feature for the analogy with ownership.

Equitable ownership has been equated with B's power to call for trust property,⁴⁹ and this power has been referred to as the 'rule in *Saunders v Vautier*'.⁵⁰ *Saunders v Vautier*⁵¹ applied a principle⁵² according to which, in some trusts, B might have a power to call for title to the trust property to be transferred to B and which imposes a correlative liability on the trustee.⁵³

Equitable ownership, and the power to call for trust property, both require B to have an absolute entitlement to trust property. However, these phenomena are not co-extensive. Equitable ownership is applicable when B has an absolute entitlement to trust property. The so-called 'rule in *Saunders v Vautier*' requires B to have an absolute interest *and* to be sui juris.⁵⁴ Further, B's power 'is not unqualified'⁵⁵ as it is subject to qualifications such as a trustee's right of

absolute entitlement correlating to the trustee's duty to distribute. The beneficiaries can collectively be described as the equitable owners of the trust property: *Glenn v Federal Comr Land Tax* (1915) 20 CLR 490, 503–05; *CPT Custodian Pty Ltd v Comr State Revenue* (2005) 224 CLR 98 [43]–[44], [47]; *Sainsbury v IRC* [1970] 1 Ch 712, 724–25 (Ungoed-Thomas J); *Schmidt v Rosewood Estate* [2003] 2 AC 709, 726 (Lord Walker). However, no particular beneficiary can be said to have an absolute entitlement, since any appointment is subject to the exercise of the trustee's discretion.

⁴⁸ *Glenn* (n47) 498 (Griffith CJ), 501–04 (Isaacs J); *Trustees Executors & Agency Co Ltd v Acting FCT* (1917) 23 CLR 576, 583 (Isaacs J); *Kent* (n41) 33–34; *Arjon Pty Ltd v Comr State Revenue* (2003) 8 VR 502, 515 (Phillips JA); *FCT v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592 [52]–[53] (the Court); *CPT Custodian* (n47) [46]–[52] (the Court); R White, 'The Nature of a Beneficiary's Equitable Interest in a Trust' (Supreme Court of NSW Annual Conference, 2007) [11].

⁴⁹ As recognised in: *Glenn* (n47) 501–03 (Isaacs J); *Kent* (n41) 32–35; *Arjon* (n48) 515 (Phillips JA); *CPT Custodian* (n47) [40]–[41] (the Court).

⁵⁰ *CPT Custodian* (n47) [42]; *Beck v Henley* [2014] NSWCA 201 [32]–[33] (Leeming JA).

⁵¹ *Saunders v Vautier* (1841) 4 Beav 115, affd on appeal (1841) Cr & Ph 240.

⁵² Recognised in earlier cases, eg: *Love v L'Estrange* (1727) 5 Bro PC 59; *Barnes v Rowley* (1797) 3 Ves Jr 305.

⁵³ *CPT Custodian* (n47) [42]–[44]; *Beck* (n50) [32]–[33]. See further: J Harris, 'Trust, Power and Duty' (1971) 87 LQR 31, 63.

⁵⁴ *CPT Custodian* (n47) [42]–[44], [47]; *Beck* (n50) [32]–[38].

⁵⁵ *Beck* (n50) [36].

reimbursement or exoneration,⁵⁶ and other potential limitations depending on the nature of the trust property.⁵⁷ The potential concurrency of application of equitable ownership, and the rule in *Saunders v Vautier*, will be of further significance for understanding some of the patterns of response to the beneficiary's proprietary claim in Chapter 4.

Returning to the metaphor of equitable ownership, there is a question whether this metaphor should be applied at all.⁵⁸ Professor McFarlane, for example, has argued that B's interest, along with other so-called 'equitable proprietary rights', should not be labelled as or analogised with true proprietary rights.⁵⁹ Likewise, Justice Meagher, writing extra-judicially, has criticised the view that B can be described as having a proprietary interest simply on the basis of the availability of equitable relief.⁶⁰ This thesis does not engage with this issue, and to some extent an analogy with ownership is sometimes required by various legislative regimes.⁶¹

The critical point for now is that the metaphor of equitable ownership is *descriptive*, and reflects the existence of certain features, relevantly: (i) the availability of the beneficiary's proprietary claim; and (ii) that B has an absolute entitlement to the benefit of trust property. Ascription of this metaphor is thus a conclusion based on

⁵⁶ *CPT Custodian* (n47) [50]–[52].

⁵⁷ A beneficiary may not be able to call for her share of trust property where the nature and type of trust property means that its division might prejudice the interests of another beneficiary: *Beck* (n50) [37]–[38].

⁵⁸ A topic much debated and about which different views have been expressed; a small sample includes: *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216, 223; A Scott, 'The Nature of the Rights of the Cestui Que Trust' (1917) 17 Colum LR 269; H Stone, 'The Nature of the Rights of the Cestui Que Trust' (1917) 17 Colum LR 467; F Maitland, *Lectures on Equity* (CUP 1929); D Waters, 'The Nature of the Trust Beneficiary's Interest' (1967) 45 Can Bar Rev 219; Milsom (n43) 6; Edelman (n35); J Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (n2).

⁵⁹ B McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 21–31; McFarlane, 'Equity, Obligations and Third Parties' (n37) 318–22. See also: Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (n23) 433–34.

⁶⁰ R Meagher, 'Sir Frederick Jordan's Footnote' (1999) 15 JCL 1, 9.

⁶¹ In *CPT Custodian* (n47), for example, the question arose whether an owner of all the issued units in a unit trust was an 'owner' of the trust property for the purposes of Land Tax Act 1958 (Vic) ss 6, 8, 39. See also: Admiralty Act 1988 (Cth) s 9, considered in *Kent* (n41); Finance Act 1940 (Eng) s 43, considered in *Baker v Archer-Shee* [1927] AC 844; *Gartside v IRC* [1968] AC 553; *Sainsbury* (n47).

the availability of the claim, and B having an absolute entitlement under the trust. Understood in this way, the metaphor of ownership cannot itself be a source of reason upon which the availability of the beneficiary's proprietary claim can be based.

The limits of descriptive metaphors were recognised by Bell, Gageler and Nettle JJ in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* in relation to the 'proprietary' nature of T's right of indemnity.⁶² The plurality stated that 'the choice of description should conform to, rather than dictate, the application of fundamental principles to "solving a concrete legal problem"'.⁶³ It is submitted these comments apply to the metaphor of equitable ownership. This metaphorical description cannot dictate the solution to understanding the beneficiary's proprietary claim.

There are further limits to reliance upon equitable ownership. As discussed next, equitable ownership cannot account for the spectrum of cases in which the beneficiary's proprietary claim is available.

ii. Equitable ownership cannot account for the cases

Even in those limited circumstances when the ownership metaphor *can* be applied to describe B's interest under an express trust, the point is that this metaphor has limited explanatory force in relation to the beneficiary's proprietary claim.

As discussed above, the metaphor of equitable ownership is applicable only where B (individually or collectively) is absolutely entitled to the trust property. Not all express trusts create an interest in B's favour that can be described as equitable ownership, and in some cases, equitable ownership may be reposed in no-one.⁶⁴ Cases have rejected as false the 'dogma'⁶⁵ that an essential attribute of a trust is that it confers a complex of legal relations which may be called ownership. For some express trusts, equitable ownership may be absent, or at least suspended for a period of time, and yet the beneficiary's proprietary claim is available, as in

⁶² *Carter Holt Harvey Woodproducts* (n30).

⁶³ *Carter Holt Harvey Woodproducts* (n30) [84] (Bell, Gageler and Nettle JJ), referring to *Livingston v Comr Stamp Duties (Qld)* (1960) 107 CLR 411, 448 (Kitto J).

⁶⁴ As in *Kent* (n41) 33; *CPT Custodian* (n47) [25].

⁶⁵ *CPT Custodian* (n47) [25]. See further: *Glenn* (n47) 497 (Griffith CJ); *DKLR Holding Co* (n29) 519 (Hope JA; Glass JA agreeing); *FCT v Linter Textiles* (n48) 606.

Yorkshire Miners' Association v Howden discussed in Chapter 1. Chapter 7 will demonstrate this point further by showing the availability of the claim to B even when her interest cannot be analogised with ownership, for example where B is a discretionary object, or someone permitted standing in respect of a charitable trust. Equitable ownership fails to explain the beneficiary's proprietary claim in these cases.

Next, equitable ownership fails to account for the remedy awarded in response to the claim. Chapter 4 will consider in more detail the pattern of response to the claim. For now, it is enough to notice that X must return property *back into trust*, that is to T, who may well be a replacement trustee. Further, X has no choice whether to give up the property in specie or pay its value.⁶⁶ An analogy with vindication of ownership requires the substance of the allegation to assert *B's right* to return of the property which arises independent of X's wrongdoing or fault, and further, the defendant has a choice whether to return property in specie or pay its value.⁶⁷ The operation and effect of the beneficiary's proprietary claim does not conform to these requirements and thus cannot be explained in terms of vindication of ownership.

In summary, Parts C.2.i–ii have argued that equitable ownership is a metaphorical label used to describe certain features of B's interest against T. This metaphor cannot be relied upon to understand the beneficiary's proprietary claim. The fact that B might sometimes have a particular interest against T in relation to trust property cannot, in turn, explain why B should have a proprietary claim against X. This point is especially evident in those cases where the beneficiary's proprietary claim is available even where B does not have an interest against T that can be analogised with ownership.

⁶⁶ A point noted before, see eg: Agnew and McFarlane (n28) 305 fn 18.

⁶⁷ B Nicholas, *An Introduction to Roman Law* (Clarendon Press 1962) 100–01; P Birks and E Descheemaeker (eds), *The Roman Law of Obligations* (OUP 2014) 6–11; Smith, 'Restitution: The Heart of Corrective Justice' (n27) 2124–26, 2170; N McBride, 'Vindicatio: The Missing Remedy' (2016) 28 SAclJ 1052, 1053.

iii. The ‘proprietary’ nature of B’s interest against T

As mentioned in Part B.1 above, some proponents⁶⁸ of the proprietary rights account do not rely upon B’s interest as equitable *ownership* but on the generally proprietary nature of B’s interest under the trust as justifying the beneficiary’s proprietary claim. The problem with this approach is that B’s interest can only be analogised with proprietary rights owing to the existence of B’s claim.

It is uncontroversial that B’s interest under a trust has been analogised with proprietary rights on the basis that B’s interest exhibits ‘the essential hallmark of any right in rem, namely that it is good against third parties into whose hands the property or its traceable proceeds may have come’.⁶⁹ This analogy is possible having regard to the substantive effect of equitable relief in response to B’s claim which, as Chapter 4 will show, allows B to exclude X from specific property. Further B’s equity for relief takes priority over X’s creditors and assignees in the event of X’s death or insolvency/bankruptcy.⁷⁰ Thus, B’s interest, while not inherently personal or proprietary, can be ‘treated as property’⁷¹ or ‘described’⁷² as proprietary in nature due to the existence of the beneficiary’s proprietary claim.

⁶⁸ See eg: *Foskett* (n6) 115 (Lord Hoffman), 127 (Lord Millett); G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 11–18, 559–65.

⁶⁹ *Akers* (n29) [2017] AC 424 [82]. See also: *DKLR Holding* (n29) 518 (Hope JA; Glass JA agreeing); Smith, ‘Unravelling Proprietary Restitution’ (n7) 319–21, 325; Smith, ‘Trust and Patrimony’ (n7) 391; Worthington, *Equity* (n45) 65–67; S Worthington, ‘The Disappearing Divide between Property and Obligation’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005) 95; Nolan, ‘Equitable Property’ (n17) 233–38; M Conaglen, ‘Thinking about Proprietary Remedies for Breach of Confidence’ (2008) 1 IPQ 82, 89 fn 57; D Fox, ‘Definition and Classification of Trusts’ in J McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) [21-003]; Agnew and McFarlane (n28) 304. The existence of the proprietary analogy on the basis of the effect of equitable relief has been recognised before, see eg: *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Dept Community Services and Health* (1990) 22 FCR 73, 120–21 (Gummow J), affd on appeal (1991) 28 FCR 291; *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch 548, 565–66 (Browne Wilkinson J); J Harris, *Property and Justice* (OUP, 1996) 53; Goode (n41) 437–38.

⁷⁰ As in *Gadson v Gadson* [2003] WASC 48 where B’s interest was enforceable against X’s personal representative. The priority of B’s interest was recognised in *Foskett* (n6) 127.

⁷¹ Worthington, ‘The Disappearing Divide between Property and Obligation’ (n69) 95.

⁷² *Carter Holt Harvey Woodproducts* (n32) [82] (Bell, Gageler and Nettle JJ); *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2019] AC 271 [201] (Lord Mance).

As mentioned already, it has been argued that it is ‘deeply misleading’⁷³ to analogise B’s interest as proprietary. This thesis does not engage with whether this analogy should be made. The point is that *if* it is to be made, a necessary feature permitting the proprietary analogy is B’s ability to exclude third parties from enjoyment of specific property, via the beneficiary’s proprietary claim. There may be other features also considered necessary to permit the proprietary metaphor, such as assignability. However, the relevance of this feature is controversial,⁷⁴ and not important to this Chapter’s argument.

The key point for now is that the existence of the beneficiary’s proprietary claim is a necessary feature permitting use of the ‘proprietary’ label. Labels such as ‘equitable proprietary rights’ or ‘equitable title’ are descriptive metaphors; these labels are conclusions, not reasons. The significance of this point for this thesis cannot be overstated, and it lays the foundations for this thesis’ argument why reliance on equitable title is problematic, as Part C.4 will explain.

3. B’s interest against X

This Part C.3 considers the nature of B’s interest *against X*. This issue arises because some proponents⁷⁵ of the proprietary rights account rely on B’s interest against X in relation to the property originally received by X to justify B’s claim to the traceable substitute later acquired by X. According to this account, B should have a proprietary claim to the traceable substitute acquired by X because B had a proprietary right in the property originally received by X. As this Part C.3 will show, that reliance is flawed because B’s interest against X in relation to the original property is not a true proprietary right.

⁷³ McFarlane, ‘Equity, Obligations and Third Parties’ (n37) 309, 321. See also: McFarlane, *The Structure of Property Law* (n38) 31.

⁷⁴ Assignability may not always be a necessary feature for the proprietary analogy: see *R v Toohey, ex p Meneling Station Pty Ltd* (1982) 158 CLR 327, 342–43 (Mason J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 165–66. The beneficiary’s proprietary claim is available to B when B may not have an assignable interest, as shown in Chapter 7. See also: *Kennon v Spry* (2008) 238 CLR 366 [162] (Heydon J).

⁷⁵ See eg: J Penner, ‘Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of Unjust Enrichment* (OUP 2009) 306, 314, 327–28; *Lewin on Trusts* (n2) [41-057].

The interest asserted by the beneficiary's proprietary claim is described by Lord Sumption as 'a true proprietary right'.⁷⁶ However, and with respect, the proprietary description is 'not literally true'.⁷⁷ As foreshadowed in Part C.1 above, there is some uncertainty about the content and nature of B's interest against X; this thesis will engage with this further in Chapter 6. For now, it is possible to show that whatever is the true nature of B's interest against X, it is not a proprietary right. Rather, B's interest, like any other equitable 'right', is an expression of the availability and form of equitable relief against X.⁷⁸

There is a closed set of proprietary rights recognised by the common law such that parties cannot create new types of rights in relation to specific property.⁷⁹ B's interest against X does not fall within this closed list for two reasons.⁸⁰ First, B's interest is not an *absolute right*, proprietary or otherwise. Second, and as argued by others before, B's *interest* against X is not proprietary in the same sense that an owner of property has a proprietary right.⁸¹ These points require further explanation.

First, as an expression of the availability and form of equitable relief, B's interest is, like any other equity for relief, subject to equitable discretion.⁸² Chapter 8 will

⁷⁶ *Akers* (n29) [82].

⁷⁷ Smith, 'Trust and Patrimony' (n7) 392, referring to Milsom (n43) 6. Note that Professor Smith was not referring directly to Lord Sumption's statement but to the ascription of the proprietary metaphor.

⁷⁸ See eg: *Glenn* (n47) 503; *Trustees Executors & Agency Co* (n48) 583; *DKLR Holding* (n29) 520 (Hope JA); *Kent* (n41) 34.

⁷⁹ *Keppell v Bailey* (1834) 2 My & K 517, 535–36 (Lord Brougham LC); W Swadling, 'Opening the Numerus Clausus' (2000) 116 LQR 354. For criticism of the continuing relevance of this principle to property law, see eg: B Edgeworth, 'The Numerus Clausus Principle' (2006) 32 Mon LR 387.

⁸⁰ Contra: Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust' (n2).

⁸¹ A similar observation was made in McFarlane, 'Equity, Obligations and Third Parties' (n37) 309, 321–22; Smith, 'Unravelling Proprietary Restitution' (n7) 318–22.

⁸² See eg: *Grimaldi* (n4) [503] (the Court), noting that it should not be suggested that 'the course of decision has rendered discretion in equity so settled as to make it appropriate to speak of 'rights' to particular remedies'; W Gummow, 'Equity: Too Successful?' (2003) 77 ALJ 30, 40–41. However, the discretionary nature of equitable remedies should not be misunderstood as importing a broad-ranging remedial inquiry, as equitable discretion is informed by equitable doctrines, see further: *White v Damon* (1802) 7 Ves 30, 35 (Lord

confront the view that equitable discretion is inapplicable,⁸³ and instead demonstrate that equitable discretion *does* have a role to play in this context.⁸⁴ The significance for now is that B cannot be understood to have an *absolute* right, because B's interest is subject to equitable discretion. The discretionary nature of B's interest against X should tend further against the view that it is a true proprietary right.

Second, the content of this interest itself may not be a *right*, proprietary or otherwise. The content of B's interest as asserted by the claim is a difficult issue, which will be confronted in Chapter 6. That Chapter will argue that the best understanding of the operation and effect of the claim as evidenced in the cases is that B's interest is not a right in the sense that it correlates to a duty owed by X. Rather, X is liable to court orders and, unless and until such orders are made, X owes no duty, and B has no correlative right.

Accepting these points, B does not have any *right* against X, let alone one that qualifies for admission into the status of *proprietary* rights. This point will be important in addressing the unjust enrichment account, which also places some reliance on B's interest against X in relation to property originally received as being proprietary in nature to explain how B's claim to the traceable substitute is part of unjust enrichment.

4. Implications for the proprietary rights account

The preceding arguments in this Part C have shown that equitable ownership and equitable proprietary rights are both metaphorical labels. As observed before, these metaphors are conclusions and do not provide reasons on which an understanding of B's interests against T or X can be based.⁸⁵ Professor Weinrib, for

Eldon); *Loan Investment Corp of Australia v Bonner* [1970] NZLR 724, 746 (Sir Garfield Barwick); J Campbell, 'When and Why a Bribe Is Held on a Constructive Trust: The Method of Reasoning towards an Equitable Remedy' (2015) 39 ABR 320, 325–30.

⁸³ *Foskett* (n6) 109 (Lord Browne-Wilkinson), 128 (Lord Millett).

⁸⁴ As recognised in *Palmer v Monk* [1962] NSW 786, 790 (Jacobs J); *Orr v Ford* (1989) 167 CLR 316, 329–30 (Wilson, Toohey and Gaudron JJ), 338–41 (Deane J); *Shropshire Union* (n3).

⁸⁵ See eg: *Carter Holt Harvey Woodproducts* (n30) [84] (Bell, Gageler and Nettle JJ); Milsom (n43) 6; Smith, 'Trust and Patrimony' (n7) 392; McFarlane, 'Equity, Obligations and Third Parties' (n37) 318–19, 321.

example, explained that ‘affixing the label of property constitutes a conclusion not a reason’.⁸⁶ The discussion above has shown that the beneficiary’s proprietary claim is the reason why it is possible to describe B as having an interest that is proprietary (in a metaphorical sense).

If these limits to equitable title are accepted, there are implications for the proprietary rights account. As Part B above has demonstrated, the proprietary rights account starts from the premise that B has some proprietary interest, and then relies upon the proprietary nature of that interest to support further arguments and draw conclusions about the claim. It is submitted that there is a fundamental flaw to the proprietary rights account, which is that its starting premise (*B has a proprietary interest or interest analogous to ownership*) assumes the conclusion (*the availability of the beneficiary’s proprietary claim*). As Part C.3 has shown, B’s interest can only be described as *proprietary* on the basis that the beneficiary’s proprietary claim is available. Part C.2 has similarly shown that B’s interest against T can only be analogised with ownership, or proprietary rights, generally, on the basis that the beneficiary’s proprietary claim is available. Thus, the starting premise of the argument, that B has a *proprietary* interest (whether ownership specifically or otherwise), is only true if the conclusion is also true. The conclusion, however, is only true if the preceding premises are true. This ‘circuitry of logic’ has been observed before.⁸⁷

Nonetheless, and as observed already in Part A, the rhetoric of equitable title is relied upon in apex court authority⁸⁸ and underpins much of our previous understanding about the beneficiary’s proprietary claim. Thus, it is not without caution that this thesis advocates an alternative approach to some of the express reasoning in the relevant cases. However, on the basis of its circuitry, and heeding the warnings about the explanatory force of equitable title, this thesis takes the view that judicial and academic accounts premised upon B’s equitable ownership

⁸⁶ E Weinrib, ‘The Fiduciary Obligation’ (1975) 25 UTLJ 1, 11. See also: *Yanner v Eaton* (1999) 201 CLR 351, 366 [17]–[20] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

⁸⁷ *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1986) 122 CLR 25, 34 (Windeyer J); *Yanner* (n86) [17]; *Zhu v Treasurer (NSW)* (2004) 218 CLR 530 [125] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ); J Heydon, M Leeming and P Turner, *Meagher, Gummow & Lehane’s Equity: Doctrines & Remedies* (5th edn, LexisNexis 2015) [4-110]; Conaglen, ‘Thinking about Proprietary Remedies for Breach of Confidence’ (n69) 87–89.

⁸⁸ See n1.

or equitable proprietary rights fail adequately to explain and justify the beneficiary's proprietary claim.

Finally, it is important to acknowledge that this thesis does, nonetheless, have some regard to the references to equitable title in the cases as a means of identifying when a given case should be understood as providing evidence of the beneficiary's proprietary claim. As mentioned in Chapter 1, there is no accepted or common label for the beneficiary's proprietary claim. One means of identifying when a case concerns this claim is by reference to, and reliance upon, equitable title. For example, and as mentioned in Chapter 1, in *Yorkshire Miners' Association v Howden*,⁸⁹ an object of a trust with a contingent and unvested interest was awarded injunctive relief to restrain what would have been a distribution of trust property contrary to the trust terms.⁹⁰ Despite the nature of the plaintiff's interest, Lord Lindley stated that the 'object [of the plaintiff's claim] is to vindicate a right to property'⁹¹ and that the plaintiff had a 'beneficial interest in the [trust funds]'.⁹² This thesis has included this case as evidence of the beneficiary's proprietary claim on the basis of the express reliance on equitable title to justify the award of relief. The invocation of equitable title in the circumstances of the plaintiff's contingent and unvested interest further underscores this Chapter's arguments as to the difficulty of reliance upon equitable title.

D. Unjust enrichment account – outline

This Part D demonstrates how the unjust enrichment account⁹³ also relies upon equitable title, which is one reason why the account should not be accepted. This Part will not, however, set out this thesis' full argument as to why the unjust

⁸⁹ *Yorkshire Miners' Association v Howden* [1905] AC 256.

⁹⁰ The plaintiff was a member of a trade union, which was an unincorporated association that held property for its members under a trust; Trade Union Acts 1871, 1876 (Eng) s 8.

⁹¹ *Yorkshire Miners' Association* (n89) 280–81.

⁹² *Yorkshire Miners' Association* (n89) 283.

⁹³ See eg: P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) ch 7, 218–19; A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 169–98, 432–33; A Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412, 417; Mitchell, Mitchell and Watterson (n36) [8-155]–[8-165]; R Chambers, 'Tracing and Unjust Enrichment' in J Neyers (ed), *Understanding Unjust Enrichment* (Hart Publishing 2004) 293–94.

enrichment account should not be accepted. Chapter 10 will conclude this thesis' arguments why the beneficiary's proprietary claim should not be understood as a response to unjust enrichment, and will draw upon some of the arguments made in the preceding Chapters.

To understand the unjust enrichment account and how it relies upon equitable title, it is necessary to observe how this account distinguishes between B's claim to the *property originally received by X* and the *traceable substitute of the original*. B's claim to the original is not considered to be part of unjust enrichment, whereas B's claim to the traceable substitute is understood as restitution for unjust enrichment. The facets of the unjust enrichment account are discussed in more detail in Part D.1 next.

1. B's claim to the original asset

The unjust enrichment account is similar to the proprietary rights account in that it understands B's claim in relation to *the original property* as a direct assertion of B's equitable ownership of, or equitable title to, the trust property.⁹⁴ The difficulties with reliance upon the metaphors of ownership and proprietary rights are set out above in Part C and apply equally here.

As discussed in Part D.2 next, the unjust enrichment account understands B's claim to the traceable substitute as part of a different phenomenon, being unjust enrichment.

2. Claim in relation to traceable substitute

This Part D.2 will show how the unjust enrichment account of B's claim to the traceable substitute relies upon B's interest in the *property originally received by X* as being a true proprietary right. This reliance is one reason why the unjust enrichment account should not be accepted. The analysis will proceed as follows: Part D.2.i will outline the unjust enrichment account of B's claim to the traceable substitute, Part D.2.ii will demonstrate this account's (flawed) reliance on equitable title, Part D.2.iii will explain why this reliance is problematic.

⁹⁴ See eg: Burrows, *The Law of Restitution* (n93) 13, 169; Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (n93) 417.

i. Unjust enrichment account of B's claim to the traceable substitute

The starting premise of the unjust enrichment account is that B's proprietary rights in relation to the original property cannot account for B's claim to the traceable substitute.⁹⁵ This argument is made on the basis that proprietary rights have certain immutable features, including their exigibility against specific property. As the authors of *Goff & Jones* explain, '[a] property right is a right to a specific thing, which cannot be detached from the thing to which it relates and reattach to some new thing'.⁹⁶ The implication is that X's substitution of the original for a new form of property means that B's claim to the traceable substitute *must* assert a different and new right. It is this new right which requires explanation, and unjust enrichment has been suggested as the alternative justification.

Pausing here, it is noted that some property scholars have challenged the assumption underpinning this argument as to the transmissibility of proprietary rights. Professor Penner, for example, has argued that B's proprietary right relates to a fund and this right, by its nature, is exigible against more than one form of property.⁹⁷ The implication is that B's claim to the traceable substitute is the assertion of her original right against a new form of property, and, like the claim to the original, vindicates B's proprietary title.

This thesis does not seek to resolve the issue of the transmissibility of proprietary rights in funds. The position taken in this thesis is that B's claim is not based upon the assertion of a pre-existing proprietary right, and nor does the claim recognise a proprietary right. Thus, arguments as to the transmissibility of proprietary rights are not relevant.

It is respectfully submitted that the unjust enrichment account incorrectly assumes a justificatory lacuna that only unjust enrichment analysis can fill. As this thesis will show in the following Chapters, there is an entirely different reason or event capable of explaining B's claim to the original and traceable substitute, and which

⁹⁵ See eg: P Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 CLP 231, 244–45; Birks, 'Receipt' (n93) 216–21; Chambers (n93) 273–74.

⁹⁶ Mitchell, Mitchell and Watterson (n36) [8-155].

⁹⁷ Penner, 'Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds' (n75) 306, 314, 327–28; Nolan, 'Property in a Fund' (n21) 113–16; *Lewin on Trusts* (n2) [41-057].

operates independent of vindication of proprietary title, property in a fund, or unjust enrichment.

Turning to B's claim to the traceable substitute, this, according to some unjust-enrichment scholars, should be understood as unjust enrichment because it is analogous with a claim in mistake.⁹⁸ That analogy is made on the basis that the beneficiary's proprietary claim satisfies the following inquiries: (i) has the defendant been enriched? (ii) was the enrichment at the claimant's expense? (iii) was the enrichment unjust?⁹⁹ An example of this argument is given by Professor Birks:

If D uses money from a trust fund and buys himself a Jaguar car, he can be said to have enriched himself at the expense of the beneficiaries. He has enriched himself by acquiring a valuable chattel, which he himself chose to obtain. That enrichment can be said to have been obtained at the beneficiaries' expense, because, although the Jaguar was never theirs, nevertheless it was obtained using their money and there is an unjust factor in the absence of their consent.¹⁰⁰

This position has been advocated by other academics¹⁰¹ and there is some limited case authority that takes a similar approach.¹⁰² Discussed next is how reliance upon B's equitable title is implicit to this account.

ii. Reliance on equitable proprietary rights

This Part D.2.ii demonstrates how the unjust enrichment account relies upon B's interest in the *property originally received by X* as being a true proprietary right.

⁹⁸ See n93.

⁹⁹ As recognised in *Banque Financière de la Cité v Parc (Battersea Ltd)* [1999] 1 AC 221, 227 (Lord Steyn), 234 (Lord Hoffman). In Australia there is some judicial recognition of the relevance of these enquiries, see eg: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 379 [46] (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [150] (the Court); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 [30] (French CJ, Crennan and Kiefel JJ). It has been argued that there is a fifth stage of inquiry, which is whether there is a juristic reason for X to retain the enrichment: J Edelman and E Bant, *Unjust Enrichment* (2nd edn, Hart Publishing 2016) 130–39.

¹⁰⁰ Birks, 'Receipt' (n93) 218–19 (emphasis in original). See also: P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 33–34.

¹⁰¹ See n93.

¹⁰² *Spangaro v Corporate Investment Australia Funds Management Ltd* [2003] FCA 1025 [49]–[51] (Finkelstein J)

The proprietary nature of B's interest in turn facilitates the analogy between B's claim to the traceable substitute and a claim in mistake. Recall from Professor Birks' example above that the property originally received by X, the trust funds, is referred to as 'their [the beneficiary's] money'. In other unjust enrichment accounts, X has 'received property *belonging to [B]*'.¹⁰³ B's 'ownership' or proprietary title allows the argument that X is enriched at B's expense when X substitutes the original property. The new substitute is acquired at B's expense because it was acquired with property belonging to B.¹⁰⁴ B's proprietary title to the original property satisfies the at the expense of inquiry.

Next, B's proprietary title facilitates satisfaction of the unjust factor. B's ownership or proprietary title in the original property renders B's consent relevant to X's substitution. As X's substitution occurs without B's consent, the transaction is thus considered normatively akin to mistake.

There is a question whether the analogical approach adopted by the unjust enrichment account is open at all in light of subsequent judicial confirmation that the stages of inquiry are not themselves legal tests, and rather that each stage embodies a distinct set of principles relevant to making out a claim for restitution of unjust enrichment.¹⁰⁵ If so, then the fact that the beneficiary's proprietary claim to the substitute might satisfy these elements may not necessarily tend to the view that unjust enrichment is the relevant event. This thesis does not pursue this issue further because, for the reasons set out in this Chapter and in Chapter 10, the beneficiary's proprietary claim does not, in any event, satisfy these inquiries. Thus, irrespective of the validity of the analogical approach adopted by the unjust enrichment accounts, taking it at its highest, the account fails according to its own terms, for reasons discussed next in Part D.2.iii.

¹⁰³ *Spangaro* [49]–[50] (emphasis added). Note this case concerned a claim for money had and received pleaded on the basis of unjust enrichment (at [47]) and which succeeded on this basis (at [53]) in relation to the misapplication of trust property, and not the beneficiary's proprietary claim. See also: Birks, 'Receipt' (n93) 218–19; Mitchell, Mitchell and Watterson (n36) [8-165]; Chambers (n93) 294, where B's equitable proprietary title satisfies at the expense of inquiry.

¹⁰⁴ Chambers (n93) 294 (emphasis added). See also: Mitchell, Mitchell and Watterson (n36) [8-165].

¹⁰⁵ *Revenue and Customs Comrs v Investment Trust Companies* [2017] UKSC 29 [41] (Lord Reed; Lord Neuberger, Lord Mance, Lord Carnwath and Lord Hodge agreeing).

iii. The problems with reliance on equitable proprietary rights

The unjust enrichment account relies upon B's equitable proprietary rights to demonstrate the analogy between B's claim to the traceable substitute and a claim in mistake. The problem with this reliance is that, for the reasons set out in Part C.3 above, B does not have proprietary title in the original property received by X. B's interest in the original can be analogised with proprietary rights or title to *describe* particular features of that interest.

Reliance on B's proprietary title is a conceptual error that carries through the unjust enrichment analysis, particularly the inquiries of (i) 'at the expense of', and (ii) the unjust factor. Essentially the unjust enrichment account can be reduced to: B should have a claim to the traceable substitute because she has equitable title in the original. The problem with this reasoning is that, for the reasons discussed above in Part C, B does not have a true proprietary right, or ownership, in relation to the original in the first place. B's metaphorical title cannot be relied upon as if it were literally true.

This problem can be observed from another angle. As discussed in Part C.2.ii above, the beneficiary's proprietary claim is available to a discretionary object, or someone interested in a charitable trust. In neither of these scenarios can B be analogised with an owner of property; nor does B have an interest in relation to the property originally received by X sufficient to demonstrate that X's substitution is at B's expense. These arguments will be developed further in light of this thesis' account of the content of B's interest against X in Chapter 6. Chapter 10 will demonstrate that the beneficiary's proprietary claim is not analogous with a claim based on a mistaken payment, and that the claim does not respond to the same normative reasons as unjust enrichment.

E. Conclusion

The proprietary rights account has received strong judicial support. It is, however, respectfully submitted that on the basis of the arguments in this Chapter, a different approach is needed, or else our understanding of the beneficiary's proprietary claim remains reliant upon a flawed premise. The flaw is that the starting premise, the existence of B's *proprietary* interest, assumes the conclusion, the availability of the beneficiary's proprietary claim. The implication is that the

proprietary rights account fails to explain and justify the beneficiary's proprietary claim.

In relation to the unjust enrichment account, this Chapter has introduced some of the problems with this account. Chapter 10 will complete this thesis' arguments why the unjust enrichment account should not be accepted and draw upon the analysis in the following Chapters. The problems with the other accounts of the beneficiary's proprietary claim, that are based on T's wrongdoing and third-party interference, are set out in Chapters 5 and 10, respectively.

Accepting the problems with the previous accounts of the beneficiary's proprietary claim, it is submitted that a new account of the beneficiary's proprietary claim is needed; this is the primary aim of this thesis. The next Chapter 3 begins this thesis' account of the beneficiary's proprietary claim.

Chapter 3 – A non-compliant execution and equity's institutional commitment to the express trust

A. Introduction

This Chapter begins this thesis' account of the beneficiary's proprietary claim. The aim of this Chapter is to introduce and explain the legal phenomenon by which the beneficiary's proprietary claim should be understood. It will be argued that the claim is concerned with a novel phenomenon, identified by this thesis, according to which equity places certain controls on power to give effect to equity's commitment to the express trust. These controls require power to be exercised: (i) in compliance with the terms by which the power is held; (ii) with fidelity to the donor's purpose, also referred to as a proper purpose; and (iii) bona fide. These are collectively referred to in this thesis as '*equity's standards*'.

These standards reflect equity's institutional commitment to preserving the *essential feature of an express trust*. That feature is that T exercises her powers over trust property in accordance with the terms of the trust mandate. An exercise of power that fails to satisfy one or more of equity's standards undermines the essential feature of an express trust, and is an event referred to in this thesis as a *non-compliant execution*. The following Chapters in this thesis will show that the beneficiary's proprietary claim responds to the event of a non-compliant execution.

To demonstrate the existence and normative significance of the event of a non-compliant execution, it is necessary for this Chapter to show: (i) how equity's standards form part of a broader suite of equitable controls on powers; (ii) equity's commitment to the essential feature of an express trust, and what that essential feature is; (iii) that standards for the exercise of power, in addition to trustee duties, are necessary to give effect to the essential feature of an express trust; and (iv) that the three standards referred to in this thesis as equity's standards are the minimum standards necessary to achieve equity's commitment to the essential feature of an express trust.

The final preliminary comments relate to nomenclature. This thesis uses the label '*non-compliant execution*' to describe the event of an exercise of power that fails

to meet equity’s standards, and which engages the beneficiary’s proprietary claim. This is in preference to other labels such as ‘unauthorised exercise of power’ or ‘breach of trust’. The label ‘breach of trust’ is sometimes associated with a breach of duty owed by a trustee.¹ To this extent, the label is inapposite to understand the beneficiary’s proprietary claim, because the claim does not respond to a breach of duty by T, as Chapter 5 will show. Further, ‘breach of trust’ can have different meanings. As Millett LJ in *Armitage v Nurse* stated, ‘[b]reaches of trust are of many different kinds’.² This ambiguity is another reason why this label is not used by this thesis.

In relation to an ‘unauthorised exercise of power’, it is first important to be clear about this thesis’ use of the term *authority* which, together with its derivative term *authorised* and antonym *unauthorised*, is used in relevant cases and academic scholarship. *Authority* can be used as a noun, interchangeably with *power*. This thesis will use the term *power* to refer to a power-holder’s (donee’s)³ capacity or ability to affect some change, and will refine this definition of power in Part D.2 below. For the sake of clarity, this thesis will not use authority interchangeably with power.

Authority can also be used qualitatively to describe the execution of power, specifically a *lawful* and thus *authorised* execution. When used in this way, authority identifies an exercise of power as lawful or legitimate.⁴ Seavey has explained the etymology of the term: ‘[a]uthority is from *auctoritas* meaning legal power, or power exercised *in conformity to law*’.⁵ Observe that implicit to this conception of authority is that power *can* be exercised even if it *should* not be exercised. We will return to this point again in the Conclusion in Part F.

¹ For further discussion of this concept, see eg: D Hayton, P Matthews and C Mitchell, *Underhill & Hayton: The Law of Trusts* (19th edn, LexisNexis 2016) [1.5]–[1.6].

² *Armitage v Nurse* [1998] Ch 241, 251.

³ The *donee* is the holder of the power, such as an agent, trustee or company director. Where a power is conferred by the actions of a legal person, such as a principal, company or settlor, that person is the *donor*.

⁴ See further: A Corbin, ‘The Authority of an Agent: Definition’ (1925) 34 Yale LJ 788, 794; J Montrose, ‘The Basis of the Power of an Agent in Cases of Actual and Apparent Authority’ (1938) 16 Can Bar Rev 757, 761–64.

⁵ W Seavey, ‘The Rationale of Agency’ (1920) 29 Yale LJ 859, 861 (emphasis added).

If authority is to be used to describe a lawful execution, then the determination of whether an execution of power is authorised or unauthorised assumes the prior application of a range of legal principles that assess the lawfulness of execution. It is beyond the scope of this thesis to provide a comprehensive definition of 'authority' and 'unauthorised' as those terms are used *beyond* the beneficiary's proprietary claim. Having said that, this thesis will explore some of the implications of its arguments for these concepts and the significance for future lines of research. This will be pursued further in Chapter 10.

The arguments in this Chapter will proceed as follows. Part B will consider how equity's standards can be contextualised as part of equity's broader suite of controls on powers. Part C will outline equity's commitment to the essential feature of an express trust, and what that essential feature is. Part D will demonstrate that standards for the exercise of power, in addition to trustee duties, are necessary to implement equity's commitment to the express trust. Part E will show that equity's standards, in particular, are the minimum necessary to implement equity's institutional commitment.

The importance of the arguments in this Chapter to this thesis' overall argument cannot be overstated. Chapter 4 will demonstrate that the beneficiary's proprietary claim is a response to the event of a non-compliant execution. This thesis' account of the function of and justification for the claim in Chapter 9 is derived from this Chapter's explanation of the normative significance of the event of a non-compliant execution.

B. Equity's standards are equitable controls on power

This Chapter 3 is concerned with the controls on powers held subject to an express trust that implement equity's commitment to the essential feature of an express trust; those controls are referred to as equity's standards. The standards require power to be exercised: (i) in compliance with the terms by which a power is held; (ii) with fidelity to the donor's purpose; and (iii) *bona fide*.

The content of these standards will be discussed in more detail in Part D. However, by way of outline: (i) *compliance with the trust terms* – requires power to be

exercised 'in the manner authorised by the trust instrument'⁶; (ii) *fidelity to the donor's purpose, also referred to as a proper purpose* – is defined by the equitable doctrine of fraud on a power and requires the power-holder (being either the trustee or another donee of power, collectively referred to as the '*donee*') to exercise a power held subject to an express trust with 'an entire and single view to the real purpose and object of the power'⁷; and (iii) *bona fide* – requires the donee to subjectively believe the exercise of power will further the interests of the beneficiaries/objects.⁸

In understanding these standards, it is necessary to explain how they exist as part of equity's broader suite of controls on power held subject to an express trust, such as trustee duties and fiduciary loyalty,⁹ and the distinctions between these various control mechanisms. This Part B explains how equity's standards should be: (i) distinguished from controls that manifest as duties imposed on the donee (Part B.1); (ii) distinguished from other controls on power (Part B.2); and (iii) understood as applying outside the express trust to control powers that arise in other institutions (Part B.3). The further purpose of the analysis in this Part B is to identify some of the analytical challenges for the rest of the arguments in this Chapter, and to introduce some key concepts and distinctions.

⁶ *Space Investments Ltd v CIBC Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072, 1073–74.

⁷ *Duke of Portland v Topham* (1864) 11 HL Cas 32, 54, applied in Australia in, eg: *Gilbert v Stanton* (1905) 2 CLR 447, 460 (the Court); *Cock v Smith* (1909) 9 CLR 773, 793; *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84, 93–94; *Australian Super Pty Ltd v Woodward* [2009] FCAFC 168 [38] (the Court).

⁸ *Armitage* (n2) 251–52; *Karger v Paul* [1984] VR 161, 176–78; R Nolan and M Conaglen, 'Good Faith: What Does It Mean for Fiduciaries and What Does It Tell Us about Them?' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 332.

⁹ The content of fiduciary loyalty and its juridical underpinnings are intensely debated; a small sample of the differing views include: M Conaglen, *Fiduciary Loyalty* (Hart Publishing 2010); J Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 LQR 302; P Finn, *Fiduciary Obligations* (Law Book Co 1977); J Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 577–98; P Miller, 'Justifying Fiduciary Duties' (2013) 58 McGill LJ 969; L Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another' (2014) 130 LQR 608; S Worthington, 'Four Questions on Fiduciaries' (2016) 2 CJCL 723. It is not necessary for this thesis to resolve these debates because, on this thesis' approach, the beneficiary's proprietary claim is not concerned with fiduciary loyalty, for reasons discussed in Chapters 4 and 5.

1. Equity's standards distinguished from duties

Equity imposes a range of controls on power, including trustee duties. *Duties* have a different form of operation to equity's standards. A duty refers to a particular form of legal relationship¹⁰ according to which the duty-holder must do, or not do, something. A duty correlates to a right in favour of another person who has a right to the duty-holder's performance of her duty. Non-performance of a duty may sound in further consequences, such as a secondary duty to compensate for loss.¹¹ Equity's standards, on the other hand, do not operate as duties, but inform a court's assessment of whether to recognise an exercise of power as valid or grant relief setting aside an exercise of power.

The distinction between duties and a standard for the exercise of power is critical for this thesis' arguments. This distinction is not new. Both Professor Lionel Smith¹² and Edelman J in *Netglory Pty Ltd v Caratti*¹³ distinguished between a principle of law that imposes a fiduciary *duty* and one that defines a *requirement* or *condition* for the exercise of fiduciary power. This thesis uses the distinction between a requirement and a duty to understand the operation of equity's standards, although this distinction will be deployed in respect of powers that are held in a fiduciary *and non*-fiduciary capacity. A key challenge for this thesis is to demonstrate that the principles identified above as 'equity's standards' do in fact operate as standards for the valid exercise of power; this is the aim of Part E below.

2. Equity's standards distinguished from other controls on power

As mentioned already, there are other controls on the exercise of power held subject to an express trust, and these may operate as duties and/or standards; they include fiduciary loyalty, a duty of consideration and a duty of care. Thus, a further challenge for this Chapter is to explain the particular significance and role of equity's standards, and why other controls on power are not relevant to the event

¹⁰ W Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16, 31–32.

¹¹ J Austin, *Lectures in Jurisprudence* (R Campbell ed, 3rd edn, 1869) 794–96; P Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1, 12–16.

¹² See eg: L Smith, 'Aspects of Loyalty' (SSRN, 31 July 2017) 2–5
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009894> accessed 24 April 2018;
L Smith, 'Prescriptive Fiduciary Duties' (2018) 37 QULJ 261, 280.

¹³ *Netglory Pty Ltd v Caratti* [2013] WASC 364 [349].

identified by this thesis as a non-compliant execution. In outline, the answer is that equity's standards have been isolated because they alone are the minimum standards necessary to implement equity's commitment to the essential feature of an express trust. Equity's other controls on power are not the minimum necessary to implement this commitment, and thus are not of themselves sufficient to identify a non-compliant execution.

To make out this argument, there are some challenges to confront. *First*, it is necessary to show that equity does give effect to the essential feature of an express trust and to articulate what is the essential feature; that is the aim of Part C next. *Second*, it is necessary to demonstrate that controls on power, in addition to trustee duties, are necessary to give effect to the essential feature of an express trust; that is the aim of Part D. *Finally*, it is critical to show that the specific controls referred to as equity's standards are the minimum necessary to give effect to the essential feature of an express trust; that is the aim of Part E.

3. Equity's standards may apply beyond the express trust

The final observation to make, in contextualising equity's standards as part of equity's controls on power, is that the principles identified as equity's standards are of general application and apply outside an express trust. Equity's standards apply to powers arising in the context of other institutions, such as companies, agencies, partnerships and administration of deceased estates, as discussed further in Chapter 9. This observation raises two further questions: (i) whether the event of non-compliant execution is a broader phenomenon arising in relation to other institutions, such as companies or agencies; and (ii) the extent to which proprietary claims for recovery of property misappropriated from these other institutions have a similar function and aim to the beneficiary's proprietary claim.

These questions have important ramifications for this thesis' account of the beneficiary's proprietary claim and are pursued further in Chapters 9 and 10. The point for now is that it is possible to understand the beneficiary's proprietary claim as being part of a broader phenomenon by which there are a range of proprietary claims available in other institutional contexts in response to a non-compliant execution. However, there are critical distinctions between the beneficiary's proprietary claim in the context of the express trust and other proprietary claims arising in different institutional contexts. These distinctions and their justifications

are discussed in Chapters 9 and 10. The analysis in this Chapter is confined to the event relevant to the beneficiary's proprietary claim, a non-compliant execution, and explaining its significance in terms of an exercise of power that undermines the essential feature of an express trust.

C. Equity's commitment to the essential feature of an express trust

1. The irreducible core of an express trust demonstrates equity's institutional commitment

As identified already in Part B.2, one of the challenges for this Chapter is to explain the particular significance and role of equity's standards, and to show that other controls on power are not relevant to the event of a non-compliant execution. Equity's standards have been isolated because they are the minimum necessary for an exercise of power to give effect to the essential feature of an express trust. This argument rests on two prior assumptions: *first*, equity's commitment to the essential feature of an express trust, and *second*, what is the essential feature. Thus, the aim of this Part C is to demonstrate these assumptions, and which of them will be of key significance for this thesis' overall account of the beneficiary's proprietary claim. To do this, the analysis in this Part C looks to the concept of the irreducible core of an express trust, and employs some of the reasoning that is *implicit* to the surrounding jurisprudence. It is thus necessary first to explain the concept of the irreducible core, and exactly how this thesis is using it; this is the aim of this Part C.1.

The concept of the irreducible core was introduced by Professor Hayton to identify the mandatory or core trustee duties (and correlative rights of the beneficiary).¹⁴ It was used by Millett LJ, in *Armitage v Nurse*, to ascertain the validity of a trustee exemption clause. Millett LJ found that the 'duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries' forms part of the irreducible core of an express trust because it is 'the minimum necessary to give

¹⁴ DJ Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press 1996) ch 3.

substance to the trusts'.¹⁵ This core duty is mandatory in its application, *because it gives effect to the essential feature of an express trust*. The core duty thus cannot be excluded by the trust terms, nor can liability for breach be exempted. Other cases¹⁶ have followed and applied *Armitage v Nurse* in relation to the existence and significance of the irreducible core, largely to ascertain the validity of trustee exemption clauses.

As mentioned already, equity imposes other controls on power held subject to an express trust, such as fiduciary loyalty, the duty to have adequate consideration, and a duty of care.¹⁷ The irreducible core concept has, so far, been employed to delineate those trustee duties that do form part of the irreducible core and are thus mandatory in their application. A consistent theme in the cases¹⁸ and academic scholarship¹⁹ is that a duty can be identified as forming part of the irreducible core if it is necessary to give effect to the essential feature of an express trust.

This thesis does not resolve the question of what duties form part of the irreducible core, and it is not necessary to do so. Chapter 5 will demonstrate that the beneficiary's proprietary claim is not triggered by a breach of duty by T. To be clear, nor is this thesis using the concept of the irreducible core to suggest that equity's standards impose *duties*. As mentioned already, a key argument of this Chapter is

¹⁵ *Armitage* (n2) 253–54, leave to appeal to the House of Lords dismissed at 264, approved by the Privy Council as representing English law in *Spread Trustee Co Ltd v Hutcheson* [2012] 2 AC 194 [46], [52] (Lord Clarke; Sir Robin Auld agreeing), [106] (Lord Mance; Sir Robin Auld agreeing).

¹⁶ *Armitage* (n2) has been applied or referred to favourably in Australian case law, see eg: *Rankine v Rankine* (unreported, QSC, de Jersey CJ, 3 April 1998); *Green v Wildern Pty Ltd* [2005] WASC 83 [493] (Hasluck J); *Leerac Pty Ltd v Fay* [2008] NSWSC 1082 [23] (Brereton J); *Motor Vehicles Insurance Ltd v Woodlawn Capital Pty Ltd* (2014) 290 FLR 285, 330 [323] (Stevenson J); *Segelov v Ernst & Young Services Pty Ltd* (2015) 89 NSWLR 431, 458–59 [145]–[146] (Gleeson JA; Meagher and Leeming JJA agreeing); *Crossman v Sheahan* [2016] NSWCA 200 [307]–[308] (Ward JA, Payne JA agreeing). See further, *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552 [284]–[285] (Edelman J); J Penner, 'Exemptions' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 250–52; D Clarry, 'The Irreducible Core of a Guernsey Trust' [2014] 17 Jersey & Guernsey LR 5.

¹⁷ See eg: C Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' (2018) 32 TLI 92, 100–02; D Clarry, *The Irreducible Core* (Hart Publishing 2019) (forthcoming).

¹⁸ See eg: *Crossman* (n16) [308] (Ward JA, Payne JA agreeing).

¹⁹ D Fox, 'Non-Excludable Trustee Duties' (2011) 17 T&T 17; Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' (n17).

that equity's standards operate as standards, not duties (developed further in Part D).

Rather, the analysis in this Chapter draws on what is implicit in the irreducible core jurisprudence, namely: (i) that equity gives effect to the essential feature(s) of an express trust by defining the controls necessary to implement the essential feature and rendering those controls mandatory in their application; and (ii) the content of the essential feature of an express trust. As discussed further in Part C.3.iii below, that feature is that T exercises her powers over trust property in accordance with the trust terms.

The irreducible core jurisprudence demonstrates equity's commitment to the essential feature of an express trust. This, in turn, permits this thesis' arguments that equity implements this commitment through the imposition of standards for the exercise of power, *in addition* to core trustee duties (Part D) and, further, that equity's standards in particular are the minimum standards necessary to ensure that an exercise of power is consistent with the essential feature of an express trust (Part E). This thesis is thus not attempting to define the irreducible core of trustee duties; nor is it submitted that equity's standards form part of that core. The argument is that equity's standards apply in addition to, and for the same reasons as, the core trustee duties: to implement equity's commitment to the essential feature of an express trust.

Accepting that equity does give effect to the essential feature of an express trust, it is necessary to consider: (i) the normative assumption underpinning the irreducible core jurisprudence and this thesis' arguments (relevantly, that equity *should* give effect to the express trust) and its essential feature; and (ii) what that essential feature is. This is the aim of the rest of this Part C. Part C.2 will consider why equity *should* recognise an express trust, and Part C.3 will set out the justification for equity's commitment to the essential feature of an express trust, and outline what is that essential feature.

2. Justifications for the express trust

Set out now are some possible justifications for equity's choice to recognise and enforce the institution of an express trust. This thesis does not seek to develop a new account for this choice and will draw on the work of other scholars. The aim is to show, to the extent necessary, that there are various justifications for equity's

choice to recognise and enforce the express trust. The significance of these justifications is that they explain equity's commitment to the essential feature of an express trust, as discussed in Part C.3 next.

One justification for the recognition and enforcement of the express trust which receives express judicial recognition is the parties' intentions to create a trust. For example, in *Pickering v Pickering*, Cottenham LC explained that 'it is the duty of the Court to carry into effect the apparent intention of [the settlor] ... [T]here is a manifestation of intention which the Court cannot overlook.'²⁰ Equity's recognition of an express trust depends upon the sufficient manifestation of the settlor's²¹ (and where there is a trust by transfer, the trustee's) intention.²² The enforcement and administration of an express trust likewise reflect equity's commitment to the settlor's 'power to direct how [her] ... property should be dealt with'.²³

Equity's commitment to the parties' intentions can be grounded in a moral and political theory referred to as 'autonomy-based liberalism',²⁴ which, broadly speaking, is a descriptive and normative account of state action and public discourse. The core or central value of this theoretical perspective is individual or personal autonomy, which is described by Professor Joseph Raz as the idea that 'people should make their own lives'.²⁵ To be autonomous, an individual must have certain capacities, and particular conditions must exist. Relevantly, one condition is the adequacy of a range of options for decision.²⁶ An individual cannot live an autonomous life if she does not have meaningful options from which to choose.

²⁰ *Pickering v Pickering* (1939) 4 My & Cr 289, 298–99.

²¹ See further: S Agnew and S Douglas, 'Self-Declarations of Trust' (2019) 135 LQR 67, 86–87.

²² *Garrett v L'Estrange* (1911) 13 CLR 430, 433–34 (Griffith CJ; Barton and O'Connor JJ agreeing); *Kauter v Hilton* (1953) 90 CLR 86, 97 (Dixon CJ, Williams and Fullagar JJ); *Byrnes v Kendle* (2011) 243 CLR 253, 272–77 [49]–[65] (Gummow and Hayne JJ); *Knight v Knight* (1840) 3 Beav 148, 172–74 (Lord Langdale MR). See further: Y Liew and C Mitchell, 'The Creation of Express Trusts' (2017) 11 J Eq 133.

²³ *Re Duke of Norfolk's Settlement Trusts* [1981] 3 All ER 220, 229 (Fox LJ; Brightman and Cumming-Bruce LJ agreeing). A commitment recognised before: P Turner, 'Introduction' in P Turner (ed), *Equity and Administration* (CUP 2016) 22.

²⁴ A label used in M Harding, *Charity Law and the Liberal State* (CUP 2014).

²⁵ J Raz, *The Morality of Freedom* (Clarendon Press 1986) 369, 370–78.

²⁶ *ibid* 371–77, 390–95.

Other scholars have explained how the express trust is one means by which private law enhances this condition for autonomy.²⁷ The express trust provides a property owner the ability to deal with her property and create rights that are not possible at law²⁸ and thus increases the range of options for the settlor in choosing how to deal with her property.²⁹ This one institution enables the settlor to choose the conception of good she chooses to pursue and the means by which she pursues it.

Other moral perspectives might focus upon the importance that legal institutions, including the express trust, play in fulfilling particular societal and economic functions.³⁰ Charitable trusts, for example, can be justified not only as fulfilling the settlor’s desire to provide for humanity in some way, but also as fulfilling the communitarian aim of providing an institution that facilitates financial provision for various social needs and enterprises.

Express trusts have also been justified from a law and economics perspective,³¹ which, broadly speaking, asks whether particular laws and legal institutions can be justified as a matter of economic efficiency(s).³² Some scholars writing from this

²⁷ See eg: G Elias, *Explaining Constructive Trusts* (Clarendon Press 1990) 9–10; S Gardner, *An Introduction to the Law of Trusts* (2nd edn, Clarendon Press 2003) 30–32; J Garton, *Moffat’s Trusts Law* (6th edn, CUP 2015) 292. See in relation to charitable trusts: Harding, *Charity Law and the Liberal State* (CUP 2014) (n24) ch 2. See also: N McBride, *The Humanity of Private Law* (Hart Publishing 2018) ch 5 pt 3, where it is argued that express trusts advance human flourishing.

²⁸ HLA Hart, *The Concept of Law* (2nd edn, Clarendon 1994) ch III; Gardner (n27); M Harding, ‘Some Arguments against Discriminatory Gifts and Trusts’ (2011) 31 *OLJS* 303.

²⁹ The potential for ‘endless innovation’ offered by an express trust has been acknowledged before, see eg: S Worthington, ‘The Disappearing Divide between Property and Obligation’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 97; S Worthington, *Equity* (2nd edn, OUP 2006) 73–77.

³⁰ See eg: *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 [57]–[66] (the Court), which acknowledged the important social and economic function fulfilled by superannuation trusts.

³¹ See eg: R Coase, ‘The Problem of Social Cost’ (1960) 3 *JLE* 1; R Posner, *Economic Analysis of Law* (Little Brown 1973).

³² Efficiency takes on various meanings depending on which specific law and economic theorist is consulted; for example, efficiency can be understood as the greatest maximisation of the social willingness to pay, or pareto efficiency.

perspective have argued that the express trust is a 'brilliant device'³³ that provides an individual settlor and social enterprise with a unique form of asset partitioning that could not practically be established otherwise.³⁴ Further, the express trust permits 'considerable customization', thereby reducing the frustration costs associated with strict regimentation of property forms³⁵ while at the same time rendering the 'information costs associated with such exotic interests far more manageable'.³⁶

3. Normative expectations of the essential feature of an express trust

Accepting the existence of these varied justifications for equity's choice to recognise and enforce the express trust, the next step is to explain why, in particular, equity should give effect to the essential feature of an express trust. The irreducible core jurisprudence implicitly assumes that equity should give effect to the essential feature of an express trust. This thesis' account of the beneficiary's proprietary claim rests on this assumption, and so it is necessary to explain this thesis' arguments why equity should give effect to the essential feature of an express trust.

In outline, this thesis' argument is that: (i) the various justifications for the express trust, at least implicitly, contain an expectation of the essential feature and function of an express trust (Part C.3.i); (ii) that expectation is that an express trust comprises a trustee with title to, and powers over, trust property, and that the trustee's power will be exercised in accordance with the trust terms (Part C.3.ii); and (iii) equity's commitment to the essential feature is a commitment to ensuring that the express trust functions in line with its normative expectations (Part C.3.iii).

i. Normative expectation(s)

First, it is important to be clear about what is meant by a *normative expectation*. The express trust is a highly flexible and malleable institution that can vary greatly in its form and context, making an exhaustive but precise definition difficult.

³³ H Hansmann and U Mattei, 'The Functions of Trust Law: A Comparative Legal and Economic Analysis' (1998) 73 NYULR 434, 434.

³⁴ H Hansmann and R Kraakman, 'The Essential Role of Organizational Law' (2000) 110 Yale LR 387, 391, 406–23.

³⁵ T Merrill and H Smith, 'The Property/Contract Interface' (2001) 101 Colum L Rev 773, 849.

³⁶ *ibid* 848–49.

Nonetheless, any justification for the express trust is based on some assumption or expectation as to its institutional form and operation. If an institution fails to function in accordance with its normative expectation(s), then the justifications for equity’s recognition and enforcement of the express trust are undermined. The next Part C.3.ii sets out one normative expectation of the essential feature of the express trust common to the justifications set out in Part C.2 above.

ii. The essential feature of an express trust

Different normative perspectives focus on different aspects of an express trust. However, it is possible to identify one expectation about the form and function of an express trust common to all the accounts canvassed above. This expectation can be identified by reference to the legal requirements for the existence of an express trust. These requirements define what, at minimum, is required for the existence of an express trust, define the essential feature of any express trust, and represent what is assumed or expected of this institution by its various normative justifications. These requirements are set out now.

One necessary requirement for an express trust is that T has title to the subject property that is sufficiently defined.³⁷ ‘It is the essence of a trust that property is vested in the trustee’³⁸ and that T holds powers incidental of that title, which includes the power to transfer and deal with her title. A further necessary requirement is for the parties to intend that T should hold property and exercise powers incidental to T’s title over property, in accordance with the trust terms.³⁹ Finally, and also necessary for the creation of the express trust, is sufficient

³⁷ *Kauter* (n22) 97 (Dixon CJ, Williams and Fullagar JJ); *White v Shortall* [2006] 68 NSWLR 650 [210]–[212] (Campbell J); *Knight* (n22) 172–74 (Lord Langdale MR); *Hunter v Moss* [1994] 1 WLR 452, 457–59 (Dillon LJ; Mann and Hirst LJJ agreeing); *Pearson v Lehman Bros Finance SA* [2010] EWHC 2914 [225] (Briggs J).

³⁸ *Chief Comr Stamp Duties (NSW) v ISPT Pty Ltd* (1998) 45 NSWLR 639, 650 (Mason P). See also: *DKLR Holding Co (No 2) Pty Ltd v Comr Stamp Duties* [1980] 1 NSWLR 510, 518–19; *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20 [82] (Bell, Gageler and Nettle JJ); *Underhill & Hayton* (n1) [1.2].

³⁹ See n22 above.

definition of the object(s) or charitable purpose, so as to ensure there is someone to hold T to account for the exercise of her power.⁴⁰

These necessary requirements together define the essential feature of an express trust: *that T holds and exercises her power over trust property in accordance with the trust terms*. Cases support this identification and description of the essential feature.⁴¹ Powell J in *Spellson v George*, for example, regarded as 'fundamental' the proposition that 'one of the essential elements of a private trust ... is that the trustee is subject to a personal obligation to hold, and to deal with, the trust property for the benefit of [the beneficiaries]'.⁴² This description was referred to favourably as 'first principles' by Lord Walker in *Schmidt v Rosewood Trust Ltd*.⁴³ In *DKLR Holding Co (No 2) Pty Ltd v Comr Stamp Duties*, B's right and T's obligation was expressed as being 'essentially ... [that T]... hold and use his legal rights *in accordance with the terms of the trust*'.⁴⁴

At a minimum, all express trusts have this feature in common: the devolution of power via reposal of title in the trustee, and T's acceptance (or self-declaration) that those powers will only be exercised in accordance with the trust terms. Even in the case of a so-called 'bare trust',⁴⁵ where T has neither active duties nor discretionary powers, T will have title to the trust property and the powers incidental to that title. T is not a 'mere cypher';⁴⁶ she holds her powers as an

⁴⁰ *Kauter* (n22) 97 (Dixon CJ, Williams and Fullagar JJ); *Knight* (n22) 172–74 (Lord Langdale MR); *Morice v Bishop of Durham* (1804) 9 Ves 399 (Sir William Grant MR); *Morice v Bishop of Durham* (1805) 10 Ves Jr 522, 539–40 (Lord Eldon LC).

⁴¹ See, eg: *Target Holdings v Redferns* [1996] 1 AC 421, 434; *Green v Russell* [1959] 2 QB 226, 241; *Space Investments* (n6) 1073–74; *Carter Holt Harvey Woodproducts* (n38) [82] (Bell, Gageler and Nettle JJ); J Campbell, 'Access by Trust Beneficiaries to Trustees' Documents, Information and Reasons' (2009) 3 J Eq 97, 142.

⁴² *Spellson v George* (1987) 11 NSWLR 300, 315.

⁴³ *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 [60].

⁴⁴ *DKLR Holding* (n 38) 520 (Hope JA) (emphasis added). This aspect of his Honour's reasoning was not questioned on appeal in *DKLR Holding Co (No 2) Pty Ltd v Comr Stamp Duties (NSW)* (1982) 149 CLR 431.

⁴⁵ *Herdegen v FCT* (1988) 84 ALR 271, 281–82 (Gummow J); *Chief Comr Stamp Duties (NSW)* (n38) 651–52 (Mason P); J McGhee (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) [21-027]–[21-028].

⁴⁶ *Ingram v IRC* [1997] 4 All ER 395, 424 (Millet LJ), affd on appeal [2000] 1 AC 293, 305 (Lord Hoffmann), 310 (Lord Hutton).

incident of title subject to the terms of the express trust and B’s power to call for title to the trust property.⁴⁷ Conversely, where the parties intend that the putative trustee is *unconstrained* in her exercise of power, the essential feature of an express trust is missing.⁴⁸ The parties do not intend to create an express trust.

This essential feature of T holding title and power over trust property in accordance with the trust terms also represents a normative expectation. Indeed, it is the existence of power that is subject to controls that is one of the strengths of this institution according to some normative justifications. Power is what makes the express trust a bespoke and malleable option for the settlor to use; this is of particular significance for the autonomy-based liberalism justification, for example.⁴⁹ The expectation that an express trust exhibit this essential feature is not expressly evidenced in all the various justifications canvassed in Part C.2. It need not be. The feature is necessary for the existence of the institution that these perspectives aim to justify, and is thus assumed as given.

iii. Equity’s commitment to give effect to the essential feature of an express trust

Accepting that the various normative justifications for equity’s choice to recognise the express trust are premised on some assumption or expectation as to the essential feature of this institution, it is submitted that there is the concomitant commitment to ensuring that the institution exists and functions consistent with its normative expectations. On this basis, the essential feature of an express trust should be mandatory and given effect, to ensure that this institution exists and functions consistently with its normative expectations. If the essential feature is not present, for example power is exercised contrary to the trust terms, the express trust does not meet its normative expectations, and the reasons for equity’s recognition of this institution no longer apply.

If these arguments are accepted, the next step in this Chapter’s analysis is to consider *how* equity implements this commitment and, in particular, to show that the imposition of standards for the exercise of power, in addition to the irreducible

⁴⁷ *Saunders v Vautier* (1841) Cr & Ph 240; *CPT Custodian Pty Ltd v Comr State Revenue* (2005) 224 CLR 98 [43]–[44].

⁴⁸ As in *Pearson* (n37) [275] (Briggs J).

⁴⁹ See Part C.2 above.

core duties, is necessary to give effect to the essential feature of an express trust. That is the aim of Part D next.

D. Standards for the exercise of power are necessary to implement equity’s commitment

The devolution of power is at once the strength and the weakness of the express trust. Power is what makes the express trust a bespoke and malleable option for the settlor to use, as discussed above in Part C.2. However, the existence of power is also a weakness because it presents a concomitant risk that power will be exercised inconsistently with the trust terms, thereby undermining the essential feature of an express trust. The imposition of duties is one means of addressing this risk, and it has largely been assumed that equity’s role in giving effect to the essential feature of an express trust is via the imposition of core trustee duties. This is evidenced, for example, in judicial explications of the essential feature in terms of obligations.⁵⁰

A key submission of this thesis is that *in addition* to the imposition of duties, there are other forms of control on power that are necessary to implement equity’s commitment to the essential feature of an express trust. These other controls are *the imposition of standards for the execution of power*. This argument can be made in two ways: (i) judicial explications of the essential feature of an express trust (Part D.1); and (ii) the methods by which an express trust devolves power (Part D.2). Each is discussed in turn.

1. Judicial explications of the essential feature of an express trust

Support for the necessity of standards for the execution of power held subject to an express trust exists in the judicial explications of the essential feature of an express trust, which show that this feature encompasses more than T’s duty to adhere to the trust terms. Relevantly, the essential feature has also been described as T being constrained in how she ‘holds’ and ‘uses’ her title. For example, B has been described as having the ‘right to have the trust property properly managed

⁵⁰ See eg: *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, 311 (McLelland J); *FCT v ElecNet (Aust) Pty Ltd* (2015) 239 FCR 359 [85] (Pagone and Edelman JJ).

and to have the trustee account for his management'.⁵¹ Recall from the passage excerpted from *DKLR Holding Co (No 2) Pty Ltd v Comr Stamp Duties* above that B's right and T's obligation 'is essentially ... [that T] ... hold *and use* his legal rights in accordance with the terms of the trust'.⁵² A similar theme is evident in other cases and some academic scholarship.⁵³ These statements reveal a concern, beyond T's performance of duties, with how powers over trust property are exercised. Accepting that the essential feature of an express trust includes the constraint of T's powers, equity's commitment to the essential feature must be implemented by other means in addition to the imposition of trustee *duties*.

2. Methods for devolution of power in an express trust

The second way to show that the imposition of constraints for the exercise of power beyond duties is necessary to implement equity's commitment to the essential feature of an express trust is to delineate the different ways in which power is devolved in an express trust. The different methods of power devolution demonstrate that the imposition of trustee duties alone cannot always secure the essential feature of an express trust. Thus, some other means of implementation are necessary.

Before explaining the different methods of power devolution it is first necessary to explain this thesis' use of the term *power*, as power is a contested topic.⁵⁴ This thesis does not need to provide an exhaustive definition of power for all purposes. The aim is to identify the types of power which arise in an express trust and which require control to implement equity's commitment to the essential feature of an express trust. It is convenient to start with Hohfeld's concept of a legal power as a donee's ability to intentionally change an object's legal relations.⁵⁵ The correlative of A's power is B's liability to a change in B's legal relations by A's exercise of power.

⁵¹ *Spellson* (n42) 316 (Powell J).

⁵² *DKLR Holding* (n38) 520 (Hope JA) (emphasis added).

⁵³ See nn41–44 above.

⁵⁴ About which see generally: S Lukes, *Power: A Radical View* (2nd edn, Palgrave Macmillan 2005); G Thomas, *Thomas on Powers* (OUP 2012) [1.01]; C Essert, 'Legal Powers in Private Law' (2015) 21 LT 136.

⁵⁵ Hohfeld (n10) 44–46.

Power is thus used in this thesis as a noun to refer to the donee’s ability to effect some change in the Hohfeldian sense.

However, further refinement of this concept is necessary. There are various categorisations of powers,⁵⁶ although only one is relevant to the express trust: powers *held subject to an express trust*, the exercise of which effects a change to B’s interest against T under the express trust. This category can be further divided into: (i) powers held incidental to T’s title to the trust property; and (ii) powers created by an express trust.

The analysis below distinguishes between (i) and (ii) and this distinction matters because the latter category shows that some powers held subject to an express trust are *not controlled by core trustee duties, or any other duty*. These powers have further significance in that they demonstrate the necessary and minimum nature of equity’s standards, as will be seen in Part E below. This distinction will also be important for the analysis in Chapter 4. Discussed now are these two subgroups of powers and the legal relations they affect.

i. Powers held incidental to T’s title

First, and irrespective of the variations in the terms of express trusts, there is one form of power that all express trusts exhibit: T’s powers which are held as an incident of the trustee’s title to trust property. As mentioned already, a necessary requirement for the existence of an express trust is that T has title to the subject property.⁵⁷ T, as the titleholder of trust property, ‘has all the powers incidental to ownership’.⁵⁸

⁵⁶ A small sample includes: *Mettoy v Evans* [1990] 1 WLR 1587, 1613–14; Thomas (n54) [1.07]–[1.21]; L Tucker, N Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) [29-007]. Another means of categorisation in the context of express trusts is to distinguish between *administrative powers* and *dispositive powers*. This thesis does not adopt this categorisation because, for reasons discussed in more detail elsewhere, it does not provide a meaningful or consistent framework for analysis, see: J Hudson and C Mitchell, ‘The Legal Consequences of the Flawed Exercise of Pension Scheme Powers’ (WG Hart Workshop for 2019 on Pensions: Law, Policy & Practice, University College London, 20–21 June 2019).

⁵⁷ *Chief Comr Stamp Duties (NSW)* (n38) 650 (Mason P). See also: *DKLR Holding* (n38) 518–19; *Underhill & Hayton* (n1) [1.2].

⁵⁸ *Carter Holt Harvey Woodproducts* (n38) [82] (Bell, Gageler and Nettle JJ).

An exercise of T’s power held as an incident of her title effects a change to the legal status of T as the transferor, and X as the transferee. Critical to the later arguments in this thesis is that B’s legal status is also affected by T’s exercise of power, having regard to *B’s interest against T*. As outlined in Chapter 2, there are different views as to the precise nature of B’s interest under an express trust.⁵⁹ Irrespective of the perspective adopted, B has some right to performance of T’s duties, and this duty-right relationship is annexed in some way to the trust property, or the trustee’s title to that property (referred to in this thesis as *B’s interest against T*). When T transfers title in the trust property to X, B’s legal status is changed, as her interest against T is no longer annexed to T’s title or specific property to which T has title. X has title to the subject property.

ii. Powers created by the express trust

The *second* subcategory of powers are those powers created by the express trust. Examples include a dispositive power of appointment, a power to amend or vary the trust terms, and a power to appoint or remove a trustee or other donee of power. Not all express trusts will create the same powers. Some express trusts will confer a power of appointment, or a power to amend the list of objects, or a power of investment, while others may not. These powers may be held by T, or by someone else, referred to as the donee, D. In *Duke of Portland v Topham*, for example, dispositive powers of appointment were conferred on T and D.⁶⁰ In *Cloutte v Storey*, a dispositive power of appointment was conferred on D, and not T.⁶¹

Essentially, the effect of exercise of these powers is to vary the trust terms according to which T holds her title to trust property. Exercise of a dispositive power of appointment, for example, varies the trust terms and T is required to hold trust property for the nominated appointee. The trust terms give content to T’s duty to use and hold her title to the trust property in compliance with those terms, and B’s correlative right to performance. A variation to the trust terms thus varies the terms according to which T is required to exercise her powers held as an incident of her title to trust property and varies B’s interest against T. Similarly, an exercise of a

⁵⁹ Chapter 2, Part C.1.

⁶⁰ *Duke of Portland v Topham* (1864) 11 HL Cas 32.

⁶¹ *Cloutte v Storey* [1911] 1 Ch 18.

power to replace T effects a change to the trust terms in relation to the legal person who holds the office of trustee. This variation in the trust terms in turn varies B’s interest in relation to the legal person who owes B the duties of trusteeship.

iii. Standards are necessary to give effect to the essential feature of an express trust

Having set out the two categories of power held subject to an express trust, it is possible to return to this thesis’ argument that the imposition of standards for the exercise of power, in addition to trustee duties, is necessary to give effect to the essential feature of an express trust. Consider the second subcategory of powers held subject to an express trust, those which are created by an express trust and can sometimes be reposed in someone other than T, set out in Part D.2.ii above. This subcategory shows that reliance upon duties imposed on T, and B’s correlative rights, will not give effect to the essential feature of an express trust.

A donee can hold power, such as a dispositive power of appointment, in a manner that is *unconstrained by any duties* as to the exercise of power. This is seen in cases such as *Duke of Portland v Topham*⁶² and *Cloutte v Storey*,⁶³ which concerned dispositive powers of appointment that were not held by T, and thus not subject to trustee duties. Further, the donees in both cases did not hold these powers subject to any duty, fiduciary or otherwise. This is seen similarly in cases concerning powers expressed to be ‘unfettered’ or ‘uncontrolled’, such as *Gisborne v Gisborne*,⁶⁴ *Re Londonderry’s Settlement*⁶⁵ and *Hayim v Citibank*,⁶⁶ which are discussed further below in Part E.2.iii. These cases show that the imposition of duties alone is not enough to implement equity’s commitment to the essential feature of an express trust.

Further, it is critical that powers created by an express trust are subject to some constraint. As explained in Part D.2.ii above, the exercise of a power created by an express trust, in one way or another, varies the trust terms according to which T

⁶² *Duke of Portland (n60)* 60.

⁶³ *Cloutte (n61)*.

⁶⁴ *Gisborne v Gisborne* (1877) 2 App Cas 300.

⁶⁵ *Re Londonderry’s Settlement* [1965] Ch 918.

⁶⁶ *Hayim v Citibank NA* [1987] AC 730 (HC) 746.

holds her powers as an incident of her title to trust property. If there are no constraints on a power to vary the trust terms, then, in substance, T’s powers are equally unconstrained. The essential feature of an express trust is not present. Powers created by an express trust must be subject to constraint and duties alone are insufficient. Some other form of control on power is needed to ensure that powers such as those in *Duke of Portland v Topham*⁶⁷ and *Cloutte v Storey*,⁶⁸ are exercised consistently with the essential feature of an express trust. A submission of this thesis is that standards that define a required manner for the exercise of power are also necessary. Part E.2.iii below will set out the cases that also support this view, and it will be seen that even so-called ‘unfettered’ or ‘uncontrollable’ powers are subject to standards that ensure an exercise of power is consistent with the essential feature of an express trust.

Accepting that the imposition of standards for the exercise of power is necessary to implement equity’s commitment to the essential feature of an express trust, the next step in the analysis is to define what standards are necessary for this task and why. Part E next will show that three standards are necessary, and minimum, to ensuring that power is exercised in accordance with the essential feature of an express trust; these have been collectively identified as equity’s standards. They are: (i) compliance with the terms by which a power is held; (ii) fidelity to the donor’s purpose; and (iii) bona fides.

E. Equity’s standards are the minimum necessary to implement equity’s commitment

To recap, the aim of this Chapter is to introduce and explain the event of a non-compliant execution as being an execution that undermines equity’s institutional commitment to the essential feature of an express trust. The analysis has borrowed from the reasoning implicit to irreducible core jurisprudence to demonstrate the existence of equity’s commitment to the essential feature of an express trust. It has been submitted that, to the extent it is necessary to justify this commitment, it is possible to do so on the basis that if equity is to recognise the institution of an express trust, there is a concomitant commitment to ensure that this institution

⁶⁷ *Duke of Portland* (n60).

⁶⁸ *Cloutte* (n61).

exists and functions consistently with its various normative justifications. These justifications all have one expectation in common: the essential feature of an express trust. That feature is that T will exercise her power over trust property in accordance with the trust terms. If an express trust fails to exist and function in the expected manner, that is, if the essential feature is not given effect, then the justifications for recognition of this institution, and the legal relations that give effect to it, are undermined. Finally, it has been argued that *standards for the exercise of power* are necessary to implement equity's commitment to the express trust by ensuring that power is exercised in a manner that gives effect to the essential feature of an express trust.

Accepting these arguments, the next task for this Chapter is to identify those standards and explain why they are the minimum necessary to give effect to the essential feature of an express trust. To do this, the analysis in this Part E will show that equity's standards are *necessary* to give effect to the essential feature of an express trust, and that equity's standards are the *minimum* standards required. The purpose is to show that an exercise of power that fails to meet one or more of these standards means that power has been exercised inconsistently with the essential feature of an express trust. Non-satisfaction of equity's standards generates the event of a non-compliant execution.

These arguments rest on a preliminary point as to the operation of equity's standards, and which concerns the distinction introduced in Part B.2 above between a duty and a standard. Relevant debates have so far assumed a binary paradigm by which principles that control power manifest either as duties, fiduciary or otherwise, or as principles that define the scope of power.⁶⁹ The approach in this thesis is that there is a third mechanism of control: the imposition of standards according to which the lawfulness of an execution will be assessed. Thus, the first aim is to explain the operation of equity's standards; this will be done in Part E.1. Part E.2 will examine the content of equity's standards to show that they are necessary to ensure power is exercised in accordance with the essential feature of

⁶⁹ See eg: R Grantham, 'The Powers of Company Directors and the Proper Purpose Doctrine' (1995) 5 KCLJ 16; Chapter 9 of this thesis; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293; C Mitchell, 'Stewardship of Property and Liability to Account' (2014) 78 Conv 215; M Ashdown, *Trustee Decision Making: The Rule in Re Hasting-Bass* (OUP 2015).

an express trust. Part E.3 will set out this thesis’ arguments why equity’s standards are the minimum required.

1. Equity’s standards – operation

This Part E.1 explains how equity’s standards operate. They: (i) are *standards* for the valid exercise of power, rather than Hohfeldian⁷⁰ duty-right relations (Part E.1.i); (ii) are distinct from the concept of the scope of power (Part E.1.ii); (iii) define a disability-immunity relationship (Part E.1.iii); and (iv) should not be understood in terms of voidness or voidability (Part E.1.iv).

i. Standards for the valid exercise of power

As mentioned already, this thesis draws on the concept of a standard or requirement for the valid exercise of power. This concept has been discussed by other scholars and judges.⁷¹ A standard does not impose a duty-right relationship but defines a required manner for the exercise of power. When there is an exercise of power that does not satisfy a standard, this is a reason for a court to refuse to recognise the execution as effective or valid and/or a reason to recognise an equity for relief to set aside the impugned execution. This Part E.1.i demonstrates how each of equity’s standards operates in this way and sets out the content of each of these standards; this will be important to the discussion in Part E.2 of the necessary nature of equity’s standards.

a. *Compliance with the trust mandate*

This first standard requires power to be exercised in accordance with the terms of the *trust mandate*. This thesis uses the label ‘*trust mandate*’ to refer to the trust terms as objectively manifested by the settlor, *and* relevant equitable principles,

⁷⁰ Hohfeld (n10) 30–33.

⁷¹ See eg: *Netglory* (n13) [349]; Smith, ‘Aspects of Loyalty’ (n12) 2–5; Smith, ‘Prescriptive Fiduciary Duties’ (n12) 280.

and statutory provisions that affect these terms.⁷² The trust mandate may also be modified by the beneficiaries' consent,⁷³ or court order.⁷⁴

When considering the role of the trust mandate in controlling T, there is sometimes a focus on T's duty to obey.⁷⁵ However, the mandate does more than this. As explained above, the essential or fundamental aspect of an express trust is that T's use of her title to trust property is subject to control.⁷⁶ This control is implemented by a duty to obey, *and* the imposition of a standard according to which T 'may only apply trust [property] ... in the manner authorised by the trust instrument, or by law'.⁷⁷

The trust mandate defines a sphere of permissible action in which power can be exercised and, conversely, a sphere in which the exercise of power is not permitted. Non-compliance with this standard occurs where an execution falls outside the sphere of permission defined by the terms of the mandate. This control applies to powers conferred by the express trust whether exercised by T, or other donees, such as a donee of a power of appointment. Finally, there is an important conceptual difference between an exercise of power that fails to comply with the

⁷² Statutory intervention may define or vary the trust mandate, see eg: Trustee Act 1925 (NSW) s 14 (power of investment); Trustee Act 1925 (Eng) pts I and II (powers of sale and investment); Perpetuities Act 1984 (NSW) (statutory modification of the rule against perpetuities). Other equitable principles define or vary the trust mandate including the trustee's right of indemnity: *Chief Comr Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 245 [47]; *Carter Holt Harvey Woodproducts* (n38) [80]–[84] (Bell, Gageler and Nettle JJ); Trustee Act 1925 (NSW) s 59(4); *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2019] AC 271 [59] (Lord Hodge).

⁷³ As in *Sharples v Adams* (1863) 32 Beav 213. Consent can operate in different ways, see eg: *Byrnes* (n22); J Payne, 'Consent' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 301; Y Liew and C Mitchell, 'Beneficiaries' Consent to Trustees' Unauthorised Acts' in P Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 83.

⁷⁴ A court with equitable jurisdiction has an inherent administrative jurisdiction to secure the competent administration of trust property, which includes authorising variation to the trust terms, including, for example, variation of trustee remuneration, see eg: *Nissen v Grunden* (1912) 14 CLR 297, 307–08; *Re Duke of Norfolk's Settlement Trusts* (n23) 230.

⁷⁵ *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 [32]; *Target Holdings* (n41) 434.

⁷⁶ Part C.3.iii above.

⁷⁷ *Space Investments* (n6) 1073–74.

terms of the mandate and actions that are 'beyond the scope of power', sometimes referred to as excessive execution,⁷⁸ which is discussed in Part E.1.ii below.

b. Fidelity to the donor's purpose

The second standard requires the donee's fidelity to the donor's purpose. Power must be exercised with 'an entire and single view to the real purpose and object of the power'.⁷⁹ This standard is defined by the equitable doctrine of fraud on a power, which evolved in relation to dispositive powers of appointment⁸⁰ and has since been extended to other powers held subject to express trusts. Fraud on a power has previously been understood as either a duty or an implied term.⁸¹ For the reasons discussed next, neither of these approaches should be accepted.

Fraud on a power does not operate as an implied term. The doctrine operates as a requirement for the exercise of power that is imposed *in addition* to other requirements, such as compliance with the terms by which power is held, to which the implication of terms would be relevant. Support for this view can be drawn from the case law,⁸² including from Briggs LJ's 'formidable dissent'⁸³ in the English Court of Appeal decision in *JKX Oil & Gas plc v Eclairs Group Ltd* to the effect that fraud on a power is a 'restriction imposed by law ... [and] ... [i]t is not a question of implied terms at all'.⁸⁴

Nor does fraud on a power impose a *duty* to act properly, fiduciary or otherwise. The cases from which fraud on a power evolved,⁸⁵ such as *Lane v Page*⁸⁶ and *Aleyn*

⁷⁸ *Pitt v Holt* [2013] 2 AC 108 [24]–[25], [60].

⁷⁹ *Duke of Portland* (n7) 54, applied in Australia in eg: *Gilbert* (n7) 460 (the Court); *Cock* (n7) 793; *Redman* (n7) 93–94; *Australian Super* (n7) [38] (the Court).

⁸⁰ See eg: *Lane v Page* (1754) Amb 233; *Aleyn v Belchier* (1758) 1 Eden 132.

⁸¹ See eg: *General Assembly of Free Church of Scotland v Overton* [1904] AC 515, 695.

⁸² See also: *Pitt* (n78) [60]–[62]; *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71 [15].

⁸³ *Eclairs Group* (n82) [29].

⁸⁴ *JKX Oil & Gas plc v Eclairs Group Ltd* [2014] EWCA Civ 640 [99] (Briggs LJ). See further: S Worthington, 'Corporate Attribution and Agency: Back to Basics' (2017) 133 LQR 118; cf P Watts, 'Actual Authority' (2017) JBL 269.

⁸⁵ *Eclairs Group* (n82) [15] (Lord Sumption).

⁸⁶ *Lane* (n80).

v Belchier,⁸⁷ concerned a power of appointment⁸⁸ held by donees who did *not* owe fiduciary or other duties. In both cases, fraud on a power was relevant to the court’s assessment whether an execution was ‘corrupt and void’,⁸⁹ and not the donee’s performance of a duty. In the cases since, the operation of fraud on a power has not changed.⁹⁰ In *Duke of Portland v Topham*, for example, the donee’s improper purpose meant that the court could not ‘permit a transaction of this kind to stand’.⁹¹ Likewise, in *Australian Super Pty Ltd v Woodward*, the donee’s improper exercise of an amendment power meant that the execution ‘w[as] ... not ... cognisable by a court of equity’.⁹²

Even in cases where the donees *do* owe fiduciary duties, fraud on a power still informs the court’s assessment whether an exercise of power should be recognised as lawful, or instead be set aside. For example, Millet J in *Re Courage Group’s Pension Schemes* stated that ‘the validity of any purported exercise of [a power to amend the terms of a pension trust] ... depends on the purpose for which [the power is exercised]’.⁹³ This understanding of fraud on a power is consistent with the operation of the doctrine in other institutional contexts. For example, in the corporate context, Dixon J in *Mills v Mills* referred to fraud on a power ‘as a means of determining the validity of the [directors’ exercise of powers] ... which otherwise are within their powers’.⁹⁴ Again, fraud on a power is expressed as relevant to the

⁸⁷ *Aleyn* (n80).

⁸⁸ The power of appointment in these cases was a power of jointure which is a power granted to a husband to make provision for the wife to the exclusion of dower, see further: G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens & Sons 1916) ch 14.

⁸⁹ *Aleyn* (n80) 138.

⁹⁰ See eg: *British Airways plc v Airways Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533 [110], [126]–[127]; *Re Courage Group’s Pension Schemes* [1987] 1 WLR 495, 511–12; *Mercanti v Mercanti* [2016] 50 WAR 495 [98], [264], special leave refused [2017] HCASL 59.

⁹¹ *Duke of Portland* (n7) 54 (Lord Westbury LC). See also: *Re Marsden’s Trust* (1859) 4 Drew 594, 600 (Sir Kindersley VC) ‘the court will not permit such an exercise of the power to prevail’.

⁹² *Australian Super* (n7) [38] (the Court).

⁹³ *Re Courage Group’s Pension Schemes* (n90) 511 (Millet J).

⁹⁴ *Mills v Mills* (1938) 60 CLR 150, 185.

court’s assessment of the validity or legitimacy of an execution of power, and not the donee’s performance of a duty.⁹⁵

Fraud on a power has also been described as defining the scope of power.⁹⁶ This thesis’ reasons for maintaining the distinction between these concepts are set out in Part E.1.ii below.

c. Bona fides

Good faith is a concept that applies across various areas within private law and is manifested in different ways,⁹⁷ including as: (i) a duty of good faith – perhaps more accurately framed as a duty not to act in bad faith; (ii) good faith as a requirement for the effective exercise of power; (iii) a duty as to adequacy of consideration;⁹⁸ and (iv) the ‘*Imperial* duty’ of good faith requiring an employer to exercise its power(s) under a pension scheme in good faith.⁹⁹

Only (ii) is relevant to the event of non-compliant execution, and this standard will be referred to as the ‘*bona fides*’ standard to delineate it from other emanations of good faith. These other emanations described in (i), (iii) and (iv) above may apply to some powers held subject to an express trust, for example those held by trustees, other fiduciaries, or the employer in the pension scheme context in relation to the ‘*Imperial* duty’ described in (iv) above.¹⁰⁰ Further, the trustee’s duty of good faith has been recognised as part of the irreducible core of trustee duties.¹⁰¹ However, this irreducible core duty and other emanations of good faith are of no further relevance to the analysis because they do not form part of the minimum necessary standards applicable to all powers held subject to an express trust, as

⁹⁵ *Hogg v Cramphorn Ltd* [1967] 1 Ch 254, 267. See also: *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 834.

⁹⁶ See eg: Grantham (n69) 39; Mitchell, ‘Stewardship of Property and Liability to Account’ (n69) 216–19.

⁹⁷ As recognised in: *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825 [1003] (Edelman J). See further: Nolan and Conaglen (n8) ch 14; L Smith, ‘Aspects of Loyalty’ (12) 20–21; C Mitchell, ‘Good Faith, Self-Denial and Mandatory Trustee Duties’ (n17).

⁹⁸ *Pitt* (n78).

⁹⁹ See eg: *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589, 567.

¹⁰⁰ *Imperial Group Pension Trust* (n99) 567.

¹⁰¹ *Armitage* (n2) 253–54.

Parts E.2–3 below will show. Further, Chapter 5 will explain why these duties are not relevant to the beneficiary’s claim.

Bona fides requires the donee to exercise power with the genuine belief that the execution will benefit the purpose for which power is granted.¹⁰² For example, in the case of a power granted for the benefit of B, *bona fides* requires the donee to subjectively believe the exercise will benefit B.¹⁰³ This is shown by *Dowager Duchess of Sutherland v Duke of Sutherland*,¹⁰⁴ where *bona fides* required the donee to ‘have regard to the interests of all the parties entitled under the settlement ... [and exercise power] ... for the benefit of the settled estate’.¹⁰⁵ *Bona fides* is concerned with the subjective intentions of the donee and *at minimum* necessitates knowledge, and some conscious consideration, of the exercise of the power.¹⁰⁶

Like fidelity to the donor’s purpose, *bona fides*, sometimes labelled ‘good faith’ or ‘honesty’, applies to the exercise of powers held in a fiduciary¹⁰⁷ and non-fiduciary capacity.¹⁰⁸ A trustee – and donee of a dispositive power of appointment as in *Cloutte v Storey* – are equally subject to this standard in the exercise of their powers.

There is a degree of conceptual alignment between *bona fides* and the standard requiring fidelity to the donor’s purpose. Both require the donee’s subjective fidelity. Indeed, the *bona fides* standard is sometimes expressed as part of fraud on a power.¹⁰⁹ The question whether these standards should be understood as the one standard or separate standards is beyond the scope of this thesis. The analysis in this thesis treats them as separate standards as there is some difference in their content.¹¹⁰ The proper purposes standard requires the donee’s subjective purpose

¹⁰² *Karger* (n8) 176–78; *Armitage* (n2) 251–52.

¹⁰³ See further: Nolan and Conaglen (n8) 331.

¹⁰⁴ *Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch 169.

¹⁰⁵ *Dowager Duchess of Sutherland* (n104) 187–91.

¹⁰⁶ *Cock* (n7) 794, 800–02 (Griffiths CJ), 807–10 (O’Connor J).

¹⁰⁷ *Armitage* (n2) 251–52; *Karger* (n8) 164–66.

¹⁰⁸ *Aleyn* (n80) 138; *Gisborne* (n64) 305.

¹⁰⁹ See eg: *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 [149]; *Duke of Portland* (n7) 54; *Vatcher v Paull* [1915] AC 372, 379–80.

¹¹⁰ Particularly in the context of application of these standards to the exercise of power by directors, as in: *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199, 217–

to align with the purpose for which power is conferred, as objectively determined from the terms of the mandate. Bona fides, on the other hand, is only concerned with what the donee subjectively believed, and not with whether the donee’s subjective purpose aligns with the purpose for which power can be exercised. The relationship between these standards is considered further in Chapter 4.

The operation of the bona fides standard, like equity’s other standards, informs the assessment of the legitimacy or lawfulness of the exercise of power, rather than acting as a duty. This is shown by *Hancock v Rinehart* where Brereton J stated: ‘the crucial question is simply whether the power (or discretion) was exercised bona fide for a proper purpose’.¹¹¹ There are other statements¹¹² of principle that discuss bona fides in terms of a standard relevant to the validity of an exercise of power, rather than imposing a duty.

Finally, there is a sense of good faith that is considered an aspect of fiduciary loyalty.¹¹³ Professor Lionel Smith, for example, has argued that good faith is a requirement for a valid exercise of fiduciary power, and requires the fiduciary to exercise her power in what she believes to be the best interests of the principal. On this account, fiduciary good faith is similar in content and form to what this thesis identifies as the bona fides standard. There is, however, a meaningful distinction between these concepts because the bona fides standard applies *irrespective* of the fiduciary capacity in which power is held.¹¹⁴ For example, bona fides is considered necessary for the valid exercise of a power *not* held in a fiduciary capacity.¹¹⁵ This distinction will be considered further in Chapter 5, in the context of showing that the beneficiary’s proprietary claim does not respond to breach of fiduciary duty.

18; *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* [2008] WASC 239 [4456] (Owen J); *Eclairs Group* (n82) [36]; *JKX Oil & Gas* (n84) [112], [122] (Briggs LJ). See also: Nolan ‘Controlling Fiduciary Power’ (n69) 298. The application of bona fides and equity’s other standards beyond the express trust will be considered in Chapter 9.

¹¹¹ *Hancock v Rinehart* [2015] NSWSC 646 [61].

¹¹² See also: *Aleyn* (80) 138; *Re Smith* [1896] 1 Ch 71, 76.

¹¹³ *Bristol & West Building Society v Mothew* [1998] Ch 1, 16 (Millet LJ); L Smith, ‘Aspects of Loyalty’ (n12) 19–20.

¹¹⁴ See also: Mitchell, ‘Good Faith, Self-Denial and Mandatory Trustee Duties’ (n17) 92.

¹¹⁵ See n108 above.

ii. Standards distinguished from the scope of power

Part E.1.i above has explained the operation of equity's standards as defining a permissible sphere for the exercise of power held subject to an express trust. The idea that power should be exercised according to certain standards may seem axiomatic, until regard is had to the fact that there are some powers that are not actually *constrained in their scope* by the terms by which they are held. This Part E.1.ii will argue that equity's standards are distinct from the scope of power. Sometimes equity's standards *do* limit the existence and scope of power, but sometimes they do *not*. The significance of this discussion is multifarious. It contributes to this thesis' account of equity's standards and addresses previous views that these standards are the same as the scope of power.¹¹⁶ Further, it will be seen that there are some powers that *can be* exercised despite non-compliance with equity's standards. The fact that power can be exercised despite non-compliance thus presents a particular risk of abuse of power, and it is this risk that is important to this thesis' account of the function of the beneficiary's proprietary claim in Chapter 9.

To distinguish between equity's standards and the concept of a scope of power, it is first necessary to set out what is meant by this concept. The *scope of a power* refers to the extent or existence of a power, that is, whether a donee does or does not have the ability to effect a change in the object's legal relations. An action which is within the scope of a power is *effective* to change the parties' rights and obligations. An action which is beyond the scope of a power is *ineffective* as the purported exercise does not change the parties' rights and obligations. The power does not exist. For example, T's power to transfer title to Blackacre does not give T the ability to deal with Whiteacre. A donee with a power to appoint among D or E does not have power to appoint to X.

The scope of a power depends on the juridical source of the power that defines the conditions for its exercise.¹¹⁷ Recall from Part D.2 above that an express trust

¹¹⁶ See n69 above.

¹¹⁷ There is, for example, debate over whether the scope of an agent's power is defined by a proper purpose or good faith, see eg: Worthington, 'Corporate Attribution and Agency: Back to Basics' (n84); cf Watts (n84). Resolution of this issue is a function of the law of agency which defines the scope of an agent's power; it is not dependent upon the operation of equity's standards.

devolves power in different ways. There are: (i) T’s power that is held as an incident of T’s title to trust property, and (ii) powers that are created by the express trust. As explained next, the scope of T’s power held incidental to her title is *not* confined by equity’s standards, and this category of power thus clearly demonstrates how these standards are not the same as the scope of a power (Part E.1.ii.a). By contrast, the scope of a power created by an express trust *is* confined by equity’s standards (Part E.1.ii.b). That these standards have multiple effects matters for this thesis’ resolution of particular analytical instabilities concerning the effect of some of equity’s standards (as discussed in Part E.1.iv below), and to this thesis’ account of the remedial response to the event of a non-compliant execution (in Chapter 4).

a. Effect of equity’s standards on power held incidental to T’s title to trust property

The scope of T’s power held incidental to her title is determined by the relevant principles of equity, law and statute that define the assignability of title to the subject property. If the trust property is land, then the scope of T’s power will be a function of the law of real property.¹¹⁸ If the trust property is a chose in action, such as a debt, then the scope of T’s power will be a function of the principles of the law of assignment, contained in equity or statute.¹¹⁹ It is likewise in relation to T’s power

¹¹⁸ See eg: Real Property Act 1900 (NSW) (transfer by registration of title to real property); Conveyancing Act 1919 (NSW) s 23C(1)(b) (a declaration of trust respecting any land or any interest therein must be in writing).

¹¹⁹ See eg: Conveyancing Act 1919 (NSW) ss 12, 23C(1)(c); Law of Property Act 1925 (Eng) ss 53(1)(c), 136; *William Brandt’s Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, 462; *Corin v Patton* (1990) 169 CLR 525, 556–59 (Mason CJ and McHugh J); D Fox, ‘Assignment of Choses in Action’ in McGhee J (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) ch 3; Y Liew, *Guest on the Law of Assignment* (3rd edn, Sweet & Maxwell 2018).

to deal with her title to an equitable chose in action, the scope of which is defined by the principles of equitable assignment,¹²⁰ or relevant statute.¹²¹

The scope of T's power is a function of these regimes that define when T, as titleholder, has the ability to deal with her title. Compliance with equity's standards is irrelevant. For example, compliance with the trust terms is not a requirement for the transfer of title to real property, or a requirement for a transfer of funds from one bank account to another. T's non-compliance with the trust terms did not confine the scope of T's power to deal with her title to trust property in cases like *Foskett v McKeown*¹²² or *Gadson v Gadson*.¹²³ In these cases, the power had been effectively exercised and X *did* receive title to the subject property. Similarly, in cases where T's exercise of power failed to comply with the standard defined by fraud on a power¹²⁴ or the bona fides standard,¹²⁵ the subject power had been effectively exercised despite non-compliance and X *did* receive title to the subject property.

¹²⁰ *William Brandt's Sons & Co* (n119) 462; *Snell's Equity* (n45) ch 3. There are differing views about the concept of an equitable assignment, see eg: J Edelman and S Elliott, 'Two Conceptions of Equitable Assignment' (2015) 131 LQR 228, and it is beyond the scope of this thesis to engage further with this issue, except to note (as explained in Part E.1.ii.b below) that equity's standards only define the scope of those powers that are created by the specific trust, or other equitable relationship, such as an equitable mortgage. A power that arises by virtue of another trust, such as a head beneficiary's power to assign her equitable title under a *head trust*, cannot be disabled by non-compliance with the terms, or an improper purpose, pertaining to a *sub-trust* by which that head beneficiary holds her equitable interest as sub-trustee. See eg: *Cory v Eyre* (1863) 1 De GJ & S 149, 166–68, where the scope of a trustee's power to assign her equitable title (equitable mortgage) was *not* constrained by non-compliance with equity's standards.

¹²¹ Conveyancing Act 1919 (NSW) ss 12 and 23C(1)(c); Law of Property Act 1925 (Eng) ss 53(1)(c) and 136; *King v Victoria Insurance Co Ltd* [1896] AC 250, 254, 256; *FCT v Everett* (1979) 143 CLR 440, 447.

¹²² *Foskett v McKeown* [2001] 1 AC 102, where X did have title to the chose in action constituted by the bank account identified as the traceable substitute of misapplied trust property.

¹²³ *Gadson v Gadson* [2003] WASC 48, where X became the registered title holder of real property.

¹²⁴ *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862; *Roadchef (Employee Benefits Trustees Ltd) v Hill* [2014] EWHC 109; *Wong v Burt* [2004] NZCA 174.

¹²⁵ See eg: *Turner v Turner* [1984] Ch 100, 111, discussed in Chapter 4.

Thus, the scope of T's power held incidental to her title to trust property is not actually confined by non-compliance with one or more of equity's standards.¹²⁶ Power *can* be exercised even when, according to equity's standards, it *should* not be. That is not to say, however, that there is no consequence to non-compliance with equity's standards. One of equity's responses is to recognise in B's favour an equity against those identified as having the subject property, X, for relief necessary so that it is as if the impugned power had not been exercised. Chapter 4 will show that the beneficiary's proprietary claim is the assertion of B's entitlement to this relief.

b. Effect of equity's standards on powers created by an express trust

We turn now to those powers that are created by an express trust, the scope of which *are* defined by equity's standards. As explained above in Part D.2.ii, powers created by an express trust, such as a power of appointment, power to amend the list of trust objects, or other powers of amendment, in one way or another, all operate to vary the terms of the trust mandate. An exercise varies the terms of the mandate and is a direction to T, who must deal with her title to trust property accordingly.¹²⁷ The scope of these powers depends upon satisfaction of equity's standards because of one feature in their operation. That feature is that these powers can only be exercised, and the trust terms can only be effectively varied, *to the extent* that a court would order T, as the titleholder, to act in accordance with the trust mandate as varied by the exercise of power.

If the mandate is effectively exercised, T must deal with T's title to trust property in accordance with the terms as amended. If necessary, a court would compel T to act in accordance with the exercise of power, such as a power appointment, and require T to deal with her title as necessary. B can seek the court's assistance in compelling T to act in accordance with the varied trust terms. The exercise of power is effective to vary B's interest under the trust *to the extent that* a court would so compel T.

¹²⁶ As noted in: *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1968] Ch 246, 303; *Akers v Samba Financial Group* [2017] AC 424 [51].

¹²⁷ *Cloutte* (n61) 30–32; *Farwell, Farwell and Archer* (n88) 1–3.

A court will not compel T to comply with the terms of a trust purportedly varied by an exercise of power that fails to meet one or more of equity’s standards. This is shown by those cases where a purported exercise of a power created by an express trust is declared ineffective where there is non-compliance with the terms of the trust mandate, an improper purpose or a lack of bona fides.¹²⁸ For example, a fraudulent purpose has been described as ‘destroy[ing] the efficacy of the exercise of the power’.¹²⁹

In summary, non-satisfaction of equity’s standards provides a reason for a court to refuse to recognise the exercise of power so that any purported exercise is ineffective. These powers *can only be exercised* if the manner of execution complies with equity’s standards; correlatively, B’s interest can only be changed by the exercise of powers created by an express trust if equity’s standards are satisfied. The significance is that in relation to these powers, equity’s standards *do limit* the scope of these powers. In the event of a non-compliant and ineffective exercise, equitable relief is available to give effect to the status quo, for example declaratory relief and consequential orders requiring delivery up of documents. Chapter 4 will demonstrate that the beneficiary’s proprietary claim is an assertion of B’s equity for this relief.

iii. Equity’s standards as defining a disability-immunity relationship

It is possible to further distinguish equity’s standards from the concept of the scope of power and to explain the multiple effects of equity’s standards with respect to the different powers held subject to an express trust. This can be done by using another of Hohfeld’s legal relations, that of a disability-immunity relationship.¹³⁰ A *disability* refers to the limit or non-existence of a power so that a donee does *not*

¹²⁸ In relation to fraud on a power and the bona fides standard, see eg: *Lane* (n80) 234–35; *Duke of Portland* (n7); *Pryor v Pryor* (1864) 2 De GJ & S 205; *Cloutte* (n61); *Re Crawshaw* [1947] Ch 356, affd on appeal [1948] Ch 123; *Re Simpson*; *Chadderton v Simpson* [1952] Ch 412, 417; *Dick v Dick* [1953] Ch 343. In relation to non-compliance with the terms of trust, see eg: *Re Abrahams’ Will Trusts* [1969] 1 Ch 463, 485–86; *Re IMG Pension Plan* [2009] EWHC 2785 [125]; *Pitt* (n78) [24]–[25], [60].

¹²⁹ *Re Simpson* (n128) 417. See also: *Australian Super* (n7) [38] (the Court); *Mercanti* (n90) [98], [264]; *Re Courage Group’s Pension Schemes* (n90) 511 (Millet J); *British Airways* (n90) [110] (Lewison LJ), [126]–[127] (Peter Jackson LJ).

¹³⁰ Hohfeld (n10) 55–58.

have the ability to effect some change to an object's legal relations. Correlatively, an *immunity* refers to the object's freedom from liability to exercise of some power. The significance of the disability-immunity concept is more accurately to describe the multiple effects of equity's standards. This concept is also relevant to this thesis' account of the extent of B's equity for relief in response to non-compliant execution as set out in Chapter 4, and X's responsibility in Chapter 6.

As I have explained elsewhere,¹³¹ the label 'disability' has previously been used by Professor Charles Mitchell to describe the operation of the requirements that power be exercised in accordance with the mandate and the requirements of fraud on a power.¹³² According to Professor Mitchell, these principles operate as limits or *disabilities* on power in that they disable the donee from exercising her powers, and *not* as duties.¹³³ This thesis takes a similar approach to Professor Mitchell in understanding these principles as not defining duty-right relations. However, this thesis uses this concept in a slightly different way because, for reasons explained next, equity's standards *do not always actually disable* the exercise of a power.¹³⁴

Whether equity's standards operate as an actual disability-immunity relationship depends on whether they effect the scope of a power. Drawing on the analysis above in Part E.1.ii, powers that are conferred by the trust mandate are confined in their scope by equity's standards, and thus are disabled by non-satisfaction of equity's standards. A purported execution of a power of appointment, for example, that fails to comply with equity's standards is *ineffective* to vary the trust terms and the parties' rights and obligations as defined by those terms. This power is thus disabled by non-compliance.

However, not all powers held subject to an express trust are disabled by non-compliance with equity's standards. T's power held incidental to her title to trust property can be exercised despite non-satisfaction of equity's standards. An exercise of T's power held as an incident of title *is effective* to vary the parties' rights

¹³¹ J Hudson, 'One Thicket in Fraud on a Power' (2019) 39 OJLS (advance online access) <<https://doi.org/10.1093/ojls/gqz017>>.

¹³² Mitchell, 'Stewardship of Property and Liability to Account' (n69) 218–19.

¹³³ *ibid.*

¹³⁴ Hudson (n131).

and obligations *despite non-compliance*. It is not possible to say that equity's standards impose an actual disability-immunity relationship.

The relevance of the concept of the disability-immunity relationship does not end here. Chapter 4 will use this concept to describe the overall pattern in the remedial response to the beneficiary's proprietary claim. It will be shown that equity's response to a non-compliant execution is to recognise an equity for relief so that it is as if the trustee was disabled and B's interest was immune from the impugned execution of power. The concept of the disability-immunity relationship will also be employed to understand the nature of X's responsibility in Chapter 6.

iv. Void or voidable?

The final point to note in the context of analysing the operation of equity's standards is that their effect is sometimes characterised in terms of voidness or voidability.¹³⁵ This thesis has taken a different approach in asking whether a given exercise of power is, or is not, effective to change the parties' rights and obligations. That approach has demonstrated that equity's standards have multiple effects, as in some instances they do confine the scope of a power, and thus disable its exercise, whereas in other instances they do not. These multiple effects is the reason why this thesis has not sought to characterise the operation and effect of these standards in terms of voidness or voidability. This argument will be developed further in Chapter 4.¹³⁶

2. Equity's standards as necessary

Part E.1 above set out the operation and content of equity's standards. This Part E.2 will show that equity's standards are necessary to give effect to the essential feature of an express trust. This argument is made on two bases: (i) the content of these standards, which is set out in Parts E.2.i and E.2.ii next; and (ii) the cases that expressly recognise the standards' necessary and mandatory nature, which are discussed in Part E.2.iii. The immediate significance is that equity's standards are thus mandatory in their application to powers held subject to an express trust. The

¹³⁵ See eg: *Pitt* (n78) [60]–[62].

¹³⁶ See also: J Hudson and C Mitchell, 'The Legal Consequences of the Flawed Exercise of Pension Scheme Powers' (WG Hart Workshop for 2019 on Pensions: Law, Policy & Practice, University College London, 20–21 June 2019); Hudson (n131).

significance is that when an exercise of power fails to meet these standards, referred to as a non-compliant execution, then the essential feature of an express trust is not present, and the institution has failed to function in line with its normative expectations.

i. **Compliance with the terms of the trust mandate**

Turning first to the standard of *compliance with the terms of the trust mandate*. This standard directly implements equity’s commitment to the essential feature. This standard is an expression of the essential feature, which is that power is exercised in accordance with the trust terms. The imposition of this standard is demonstrated by the cases discussed above in Part E.1.i.a, for example Lord Templeman’s statement in *Space Investments v CIBC Trust Co* that T ‘may only apply trust [property] ... in the manner authorised by the trust instrument, or by law’.¹³⁷

If T is not constrained in how she exercises her powers over trust property, then the essential feature of an express trust is missing. Equally, it is necessary for powers created by an express trust and not held by T to be subject to this same constraint. As discussed in Part D.2.ii above, exercise of these powers varies the trust terms according to which T holds her powers as an incident of her title to trust property. If there are no constraints on a power to vary the trust terms, then, in substance, T’s powers are equally unconstrained. The essential feature of an express trust will not be present and the institution will have failed to function in line with its normative expectations.

ii. **Fraud on a power and the bona fides standard**

Fraud on a power and the bona fides standard both implement equity’s commitment to the essential feature of an express trust on the basis that they protect against an exercise of power designed to subvert or undermine the first standard, compliance with the trust mandate. Their function is thus subsidiary to, or derivative from, the first standard, but no less necessary. A common theme in the cases¹³⁸ is that these standards are concerned with an exercise of power

¹³⁷ *Space Investments* (n6) 1073–74.

¹³⁸ See eg: *Topham v Duke of Portland* (1863) 1 De GJ & S 517, 571; *Duke of Portland* (n7) 54–60; *Topham v Duke of Portland* (1869) LR 5 Ch App 40, 59; *Vatcher* (n109) 379–80; *Eclairs Group* (n82) [15]–[22].

designed to achieve some purpose ulterior to the donor's intended purpose as defined in the terms of the trust mandate. As explained by the English Court of Appeal in *Re Greaves*, 'the essential quality of the vice which constitutes a fraud on a power' is that the donee exercises her power in a manner that 'defeat[s] ... or depart[s] from the intention of the donor of the power'.¹³⁹

These standards assume equity's prior commitment that power ought to be exercised in accordance with the terms of the trust mandate, and provide necessary support for this commitment. If power did not need to be exercised with fidelity to the donor's purpose and bona fide, then power could be exercised in a manner that undermines the terms of the trust mandate. These standards are thus necessary to support the essential feature of an express trust and ensure that the institution functions in line with its normative expectations. These standards are therefore mandatory in their application.

iii. Supporting cases

This thesis' claim as to the necessary, and therefore mandatory, nature of equity's standards can also be supported by looking to the cases that recognise that these standards apply to all powers held subject to an express trust. Consider, for example, those powers expressed to be 'unfettered' or 'unconstrained'. Cases indicate that these powers are still subject to equity's standards. This is shown by *Gisborne v Gisborne*, where a power was described as 'uncontrollable', *but only if* 'there is no mala fides with regard to its exercise'¹⁴⁰ and 'subject to that object being attained'.¹⁴¹ Thus, this 'uncontrollable' power was still confined to its terms, and still subject to the requirements of fidelity to the donor's purpose and bona fides.

Similarly, Salmon LJ in *Re Londonderry's Settlement* indicated that a discretionary power 'cannot be challenged', '[s]o long as the ... exercise of this power [is] ... bona fide with no improper motive'.¹⁴² Likewise, in *Hayim v Citibank*, T had 'no responsibility or duty with respect to' T's exercise of power to postpone a sale of trust property; however, the proper purpose and bona fides standards still applied

¹³⁹ *Re Greaves* [1954] Ch 434, 446–47.

¹⁴⁰ *Gisborne* (n64) 305 (Lord Cairns).

¹⁴¹ *Gisborne* (n64) 309 (Lord Penzance).

¹⁴² *Re Londonderry's Settlement* (n65) 936–37.

to its exercise.¹⁴³ There are further cases that repeat this pattern¹⁴⁴ and show that even when a power is expressed to be 'uncontrollable' or 'unfettered', equity's standards still apply.

The necessity of equity's standards can be further tested in relation to unlimited or general powers of appointment, such as a power to appoint to anyone the donee wishes. A general power could be understood as free from equity's standards. However, further scrutiny suggests that these standards *do* apply, but, owing to the nature of the power, are likely to be satisfied in most cases.

Consider the requirement to act in good faith and fidelity to the donor's purpose. A general power of appointment allows the donee herself to determine the purpose for which she exercises the power, and thus the person who is to benefit from its exercise. The implication is that any appointment made by the donee will be for a proper purpose and in good faith. Thus, these two standards *do apply* but are always going to be satisfied.

In relation to the requirement to act within the terms of the mandate, this standard also constrains the exercise of power. A general power to appoint trust property, Whiteacre, does not permit the exercise of power in relation to Blackacre, for example. Again, equity's standards still apply.

This Part E.2 has demonstrated that equity's standards are necessary to implement equity's commitment to the essential feature of an express trust. An exercise of power that fails to satisfy equity's standards, a non-compliant execution, thus can be understood as an exercise that undermines the essential feature of an express trust.

3. Equity's standards are the minimum required

The final argument of this Chapter that equity's standards are the *minimum* standards necessary to implement equity's commitment to the essential feature of the express trust. A theme running throughout this Chapter is the distinction

¹⁴³ *Hayim v Citibank NA* [1987] AC 730, 746–47.

¹⁴⁴ In addition to the cases discussed next, see: *Karger* (n8) 163–66; *Curwen v Vanbreck Pty Ltd* [2009] 26 VR 335 [36]; *Duke of Portland* (n7) 54; *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 209–10. See also: R Nolan, 'Trustees and Third-Party Powers' in R Nolan, K Low and T Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018) 61.

between equity's standards and other controls on power, such as fiduciary loyalty, and trustee duties, such as adequacy of consideration or a duty of care. These other controls do not form part of the *minimum* standards required to give substance to the essential feature of an express trust, and are not relevant to the event of a non-compliant execution, for two reasons: (i) they do not apply to all powers held subject to an express trust, and (ii) they are conceptually aligned with the irreducible core of an express trust. Each is discussed now.

i. **Other controls do not apply to all powers held subject to an express trust**

Other controls on power, such as T's duty of consideration, a duty of care, or fiduciary duties, are not the minimum means necessary to implement equity's commitment to the essential feature of an express trust, and are not relevant to the event of a non-compliant execution. This can be demonstrated by showing that these controls do not apply to *all* powers held subject to an express trust.

Consider those powers *not* held in a fiduciary capacity.¹⁴⁵ As explained in Part E.2.iii above, equity's standards *do* apply to these powers; however, they are not subject to other controls, such as adequacy of consideration, a duty of care or fiduciary duties. In addition to the cases discussed above in Part E.2.iii, this point is expressly made in *Re Burton* where Davies J stated, '[a] power, *even though not a fiduciary power*, must be exercised solely in furtherance of the purpose for which it was conferred'.¹⁴⁶ Powers held subject to an express trust, but *not* held in a fiduciary capacity, thus demonstrate the *minimum* nature of equity's standards, in addition to their necessity to giving effect to the essential feature of an express trust.

In excluding these other controls from the minimum means necessary to implement equity's commitment to the essential feature of an express trust, it is acknowledged that adequacy of consideration is sometimes expressed as an 'essential' requirement, for example in *Re Hay's Settlement Trusts*¹⁴⁷ and *Karger v Paul*.¹⁴⁸ However, these statements should not be understood as suggesting that

¹⁴⁵ See eg: *Pryor* (n128); *Gisborne* (n64); *Duke of Portland* (n7) 60, which concerned executions of powers held by T under one trust and a donee of a power of appointment under another trust; *Cloutte* (n61); *Hayim* (n143) 746–47.

¹⁴⁶ *Re Burton* (1994) 126 ALR 557 [11] (emphasis added). This aspect of Davies J's reasoning was referred to in *Scaffidi* (109) [149] (Murphy JA and Hall J); *Mercanti* (n90) [315].

¹⁴⁷ *Re Hay's Settlement Trusts* (n144) 210.

¹⁴⁸ *Karger* (n8) 163–65.

the requirement for adequacy of consideration is a necessary standard. These statements can be understood in either of two ways, both of which are consistent with this thesis' arguments: *first*, as referring to the trustee's duty to have adequate consideration, or *second*, as referring to a necessary condition for satisfaction of the bona fides standard.

To the extent that the statements in *Re Hay's Settlement Trusts*¹⁴⁹ and *Karger v Paul*¹⁵⁰ refer to adequacy of consideration as part of a trustee's or fiduciary's duties, this requirement is not part of equity's *minimum standards*. These statements may have significance for the debate concerning the content of the irreducible core of trustee duties. But as explained already in this Part, the duty to consider does not apply to powers held by a donee in a non-fiduciary capacity, and thus cannot form part of the minimum standards necessary to implement equity's institutional commitment to the express trust.

Alternatively, the statements regarding the 'essential' nature of adequacy of consideration can be understood as meaning that adequacy of consideration forms part of the bona fides standard. The bona fides standard requires the donee to have formed a subjective belief about the end for which power is exercised, as discussed above in Part E.1.i.c. In order to form this belief, it is necessary for the donee to know about the existence of the power, and to have considered its exercise and the end for which it is held. Bona fides thus necessitates some prior consideration as to the circumstances of the exercise of power and the objects. Adequacy of consideration can be understood as necessary to the donee's conscious consideration required to satisfy the bona fides standard, but may not be sufficient to satisfy this standard. If so, the essentiality of adequacy of consideration simply reflects the mandatory nature of the bona fides standard.

ii. Conceptual alignment between equity's standards and the irreducible core duties

The *second* argument in favour of the minimum nature of equity's standards is their conceptual alignment with the irreducible core of trustee duties. Millett LJ in *Armitage v Nurse* identified '[t]he duty of the trustees to perform the trusts

¹⁴⁹ *Re Hay's Settlement Trusts* (n144) 210.

¹⁵⁰ *Karger* (n8) 163–65.

honestly and in good faith for the benefit of the beneficiaries’ as the ‘minimum necessary to give substance to the trust’.¹⁵¹ Later case law has clarified that the one duty referenced by Millett LJ encompasses multiple duties, including to obey the trust terms and to act in good faith.¹⁵² There is, thus, some correlation with the irreducible core of trust duties and equity’s standards that require compliance with the trust mandate and bona fides.

The significance of these points of correlation is that the case law concerning the irreducible core of trustee duties has already expressly found that the irreducible duties are the minimum necessary trustee duties required to give substance to an express trust. Allowing for the difference in form between core *duties* and equity’s *standards*, it is submitted that the conceptual correlation lends support for this thesis’ claims that: (i) equity’s standards are the *minimum* necessary to ensure power is exercised in a manner consistent with the essential feature of an express trust, and (ii) other controls on power, such as the duty of care¹⁵³ and fiduciary loyalty,¹⁵⁴ are not necessary to implement equity’s commitment to the essential feature of an express trust.

F. Conclusion

The aim of this Chapter has been to introduce and explain the event relevant to the beneficiary’s proprietary claim, which is a non-compliant execution. A non-compliant execution is a novel event identified by this thesis, describing an exercise of power that undermines the essential feature of an express trust. This event is defined by an execution that fails to satisfy equity’s standards, being: (i) compliance with the trust mandate; (ii) fidelity to the donor’s purpose; and (iii) bona fides. Equity’s standards ensure that power is exercised consistently with the essential feature of an express trust, and their imposition reflects equity’s institutional commitment to the express trust. The analysis in this Chapter has drawn on the irreducible core jurisprudence to demonstrate equity’s commitment to the

¹⁵¹ *Armitage* (n2) 253–54.

¹⁵² *Crossman* (n16) [307] (Ward JA, Payne JA agreeing).

¹⁵³ *Armitage* (n2) 253–54.

¹⁵⁴ The issue whether fiduciary duties formed part of the irreducible core was identified but left open in *Wildern Pty Ltd v Green* [2009] WASCA 38 [166]. See further: Mitchell, ‘Good Faith, Self-Denial and Mandatory Trustee Duties’ (n17).

essential feature of an express trust. The normative significance of a non-compliant execution is that the trust has failed to function in line with its normative expectations which inform equity's choice to recognise the institution in the first place.

The arguments in this Chapter are critical to the rest of this thesis. This Chapter has set out some key conceptual parameters, such as the ways in which an express trust devolves power, and the corresponding risk of a non-compliant execution. Chapter 4 will show that the beneficiary's proprietary claim responds to this problem of a non-compliant execution. Chapter 9 will argue that the claim implements equity's commitment to the essential feature of an express trust by providing an assurance that power will not be exercised inconsistently with equity's standards.

The final observation is in relation to the concept of authority. Part A introduced the idea that if *authority* is used to describe a lawful exercise of power, there may be a connection between a non-compliant execution and an unauthorised exercise of power. The analysis in this thesis tends in favour of the view that authority, *to the extent that the concept is relevant to the beneficiary's proprietary claim*, is informed by equity's standards. Chapter 4 will demonstrate how the case evidence supports this conclusion, and Chapter 10 will further set out this thesis' arguments in relation to authority.

There is a broader question whether equity's standards inform authority *outside* the beneficiary's proprietary claim, for example in determining a trustee's liability to account.¹⁵⁵ This line of inquiry is, however, beyond the scope of this thesis and represents an area for future research. The point for now is to highlight how the arguments in this Chapter 3 may contribute to future development of a novel account of authority as defining a sphere of lawful execution, to ensure an institution aligns with its normative expectations; but this is left for another day.

¹⁵⁵ As in: *Youyang* (n75) [32]–[33], [63], [69]; *Molyneux v Fletcher* [1898] 1 QB 648; *Re Pauling's Settlement Trusts* [1964] Ch 303. It is acknowledged that there is some divergence in England over the availability and measure of some of these monetary remedies in light of *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503, examination of which is beyond inquiry here, and about which much has been written; a small sample includes: *Underhill & Hayton* (n1) [87.13]–[87.15]; S Elliot, 'Personal Monetary Claims' in McGhee J (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) ch 20; M Conaglen, 'Equitable Compensation for Breach of Trust: Off Target' (2016) 40 MULR 126.

Chapter 4 – The beneficiary’s proprietary claim and a non-compliant execution

A. Introduction

This Chapter provides an account of the operation and effect of the beneficiary’s proprietary claim as it is evidenced in the cases. There are two critical features to that account. *First*, the beneficiary’s proprietary claim is available when there is an exercise of power held subject to an express trust and that exercise fails to comply with one or more of equity’s standards, being: (i) compliance with the terms of the trust mandate; (ii) fidelity to the donor’s purpose; and (iii) bona fides. Chapter 3 identified this event as a ‘non-compliant execution’ and explained the content and operation of these standards, and the normative significance of that event. The *second* feature relates to the response. This Chapter will show that the response to a non-compliant execution is to recognise an equity for relief necessary to place B in the position so that it is as if the non-compliant execution had not occurred. The beneficiary’s proprietary claim is B’s assertion of her equity for this relief.

This Chapter will proceed as follows: Part B will explain this Chapter’s method and approach to analyse and interpret the cases. Part C will explain the availability of the beneficiary’s proprietary claim. Part D will explain the remedial response in relation the beneficiary’s proprietary claim.

B. Method and approach

The aim of this thesis, and in particular this Chapter, is to develop an account of the beneficiary’s proprietary claim from ‘judicial decisions upon particular instances, not the other way around’.¹ The arguments in this thesis as to the operation and effect of the claim are therefore derived from the cases, being sensitive to the

¹ *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544 (Gummow J). This thesis does not seek to engage in the debates about the role and value of ‘top-down’ and ‘bottom-up’ legal reasoning; see further: *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J); R Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 U Chi L Rev 433, 433; K Mason, ‘Do Top-Down and Bottom-Up Reasoning Ever Meet?’ in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010).

express reasoning in those cases. However, for reasons discussed in Chapter 2, there are some limitations to our ability to rely upon some aspects of the express reasoning in the cases. For example, the beneficiary’s proprietary claim has sometimes been expressed as a claim that asserts an equity for relief to vindicate or protect B’s equitable title. Therefore, and for the reasons discussed in Chapter 2, this thesis does not rely upon the express reasoning in the cases to the extent that the reasoning is based upon the claim being a response to equitable title.

However, this does not necessitate that those cases are excluded from analysis altogether. Rather, the immediate consequence is that some interpretive analysis is also used to consider what is implicitly revealed about the beneficiary’s proprietary claim from the cases, including those that expressly rely upon equitable title. This Chapter will consider factors such as the case outcome, decided facts and other aspects of the express reasoning in the cases to ascertain underlying pattern(s) in the availability of, and remedial response to, the beneficiary’s proprietary claim.

Pausing here, an example of this approach and its implications is presented in the following analysis of *Re Diplock*.² That case concerned multiple claims, including the beneficiary’s proprietary claim, albeit that label was not expressly used in the case. The express reasoning of the English Court of Appeal in *Re Diplock* invoked the rhetoric of equitable title. The claimants’ proprietary claim was described as a ‘specific order for restoration of what in the eyes of equity never ceased to belong in equity to the estate’.³ The problems with this approach were set out in Chapter 2, and for those reasons, this thesis does not rely upon this aspect of the express reasoning in this case.

Nonetheless, this case remains relevant as it is evidence of the beneficiary’s proprietary claim.⁴ This argument might be controversial in light of other academic arguments⁵ that *Re Diplock* did not concern a trust but an unadministered estate

² *Re Diplock* [1948] Ch 465.

³ *Re Diplock* (n2) 522.

⁴ *Re Diplock* [1947] Ch 716 (Wynn-Parry J), revd on appeal to the Court of Appeal (n2), affd on appeal to the House of Lords in *Ministry of Health v Simpson* [1951] AC 251.

⁵ See eg: L Smith, ‘Unjust Enrichment, Property and the Structure of Trusts’ (2000) 116 LQR 412, 437–39; T Akkouch and S Worthington, ‘*Re Diplock*’ in C Mitchell and P Mitchell (eds),

under which the claimants had no proprietary rights.⁶ The express reasoning in the case does not identify whether the estate was unadministered or not. However, by using an interpretive approach, it can be seen that *Re Diplock* did not concern an unadministered estate, but a trust created under the statutory intestacy regime.

To make this point, it is necessary to consider the facts of the case and applicable intestacy regime.⁷ In *Re Diplock*, the executors made dispositions of the testator’s estate purportedly in accordance with charitable bequests in the testator’s will. However, the clauses supporting these dispositions were later declared invalid.⁸ The invalidity of the charitable bequests meant that the relevant property was subject to the statutory intestacy regime.⁹ According to that regime, the property in respect of which the testator died intestate was held under a statutory trust for the testator’s next of kin. In consequence, the subject property *was not, and never was*, held by the executors pursuant to the testator’s will. The property was held pursuant to a statutory trust per the intestacy regime, and the claimants in *Re Diplock*, as the testator’s next of kin, were the beneficiaries under this trust. Some express support for this interpretation can be drawn from the first instance decision of Wynn-Parry J, who recognised that the plaintiffs were ‘among the persons entitled under the *Administration of Estates Act*, 1925, to share in such part of the estate ... as to which [the testator] ... died intestate’.¹⁰ Further, the recipients were required to return property to the judicial trustee appointed as trustee in relation

Landmark Cases in the Law of Restitution (Hart Publishing 2006) 320; G Virgo, *Principles of the Law of Restitution* (3rd edn, OUP 2015) 618; J Edelman and E Bant, *Unjust Enrichment* (2nd edn, Hart Publishing 2016) 289–90; D Salmonds, ‘Claims against Third-Party Recipients of Trust Property’ (2017) 76 CLJ 399, 423.

⁶ See generally: *Comr Stamp Duties (Qld) v Livingston* [1965] AC 694, 707–08 (the Board); *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306, 313 (the Court). Note, however, that on this thesis’ arguments in Chapter 2 it is still possible to say that the beneficiary of an unadministered estate *does* have an interest that can be described as ‘proprietary’ given the availability of a proprietary claim against X, as recognised in *Re Maye* [2008] UKHL 9 [17] (Lord Scott). See also: M Conaglen, ‘Thinking about Proprietary Remedies for Breach of Confidence’ (2008) 1 IPQ 82, 89–90.

⁷ Part IV of the Administration of Estates Act 1925 (Eng) s 46.

⁸ See: *Chichester Diocesan Fund & Board of Finance (Inc) v Simpson* [1944] AC 341.

⁹ Part IV of the Administration of Estates Act 1925 (Eng) s 46.

¹⁰ *Re Diplock* (n4) 722.

to the residuary estate in respect of which the testator died intestate.¹¹ The proprietary claim in this case is thus part of the phenomenon of concern to this thesis.¹²

Returning to this thesis’ approach, it is to interpret a case as concerning the beneficiary’s proprietary claim where one or more of the following features are present: (i) the success of B’s claim turns upon whether X can make out the plea of bona fide purchaser. The significance of this factor is that *if* the case concerned knowing receipt then the onus would fall on B to prove knowledge as an element of that claim, not X to prove a lack of notice; (ii) B’s claim depends upon her ‘equitable title’ and whether B’s interest takes priority to or is free from X’s interest;¹³ and (iii) relief is awarded where there is a non-compliant execution, and the form of relief is consistent with the pattern observed in Part D below as to the response to the beneficiary’s proprietary claim, and X is not, for example, ordered to compensate for loss as if she were an express trustee.

The relevance of these features can be demonstrated by a second case example, *Harper v Brown*,¹⁴ which, according to its express reasoning might be understood as being concerned with either the beneficiary’s proprietary claim, or some other phenomenon, such as knowing receipt. The distinction between these claims was discussed in Chapter 1 and is relevant for the analysis in this Chapter as there are some cases that do not expressly identify the cause of action as being either one claim or the other. Sometimes, a case expressly records a finding that X did not have any notice or knowledge, which makes clear that the case does not concern

¹¹ See eg: *Re Diplock* (n2) 505–06.

¹² This thesis’ characterisation of *Re Diplock* as concerning the misapplication of property from a trust, rather than a deceased estate, has potential implications for the personal claim for restitution of the value of property received, outlined in Chapter 1, Part C.1.iii, consideration of which is beyond the scope of this thesis.

¹³ See eg: *Palmer v Monk* [1962] NSW 786, 789–92; *Devaynes v Robinson* (1856) 24 Beav 86, 94–97; *Dudley v Champion* [1893] 1 Ch 101, 116; *Perham v Kempster* [1907] 1 Ch 373, 380.

¹⁴ *Harper v Brown* (1884) 8 LR (NSW) Eq 86, affd on appeal [1887] NSW 116.

knowing receipt.¹⁵ However, in other cases,¹⁶ such as *Harper v Brown*,¹⁷ X is found to have some level of notice or knowledge, so that regard must be had to other factor(s) to determine whether a given case concerns the beneficiary’s proprietary claim.

Harper v Brown concerned a trustee’s exercise of a power of sale of trust property that did not comply with the trust terms, rendering the exercise of power ‘null and void’¹⁸ as between T, X and B. The issue of X’s notice was relevant to the question which of the multiple recipients could raise the plea of bona fide purchaser to defeat B’s claim.¹⁹ Relief was granted requiring X to pay the value of the subject property, ‘as if [B] had continued to be ... [the] owner’ of the subject property.²⁰ Relief was not expressly based on knowing receipt. On the basis of these features, *Harper v Brown* has been included in this thesis as a case concerning the beneficiary’s proprietary claim, and not knowing receipt. A similar interpretive approach has been taken in understanding other cases as evidencing the beneficiary’s proprietary claim rather than knowing receipt.²¹

This thesis is primarily concerned with Australian and English law. The cases for this thesis’ analysis have been drawn from Australia and England, with some reference to cases from other jurisdictions, such as New Zealand and Canada, where those cases have been identified as relevant according to Australian or English cases. This thesis does not, however, adopt a comparative approach; English cases are examined in addition to Australian, to provide a larger body of cases from which conclusions about the operation and effect of the claim can be drawn. English case law has been selected in particular, given the precedential significance for

¹⁵ As in: *Foskett v McKeown* [2001] 1 AC 102, 106 (Lord Browne-Wilkinson), 132 (Lord Millett).

¹⁶ In addition see: *Futter v Toohey* (1897) 2 SCR (NS) (NSW) Eq 20; *Palmer* (n13); *Stroughill v Anstey* (1852) 22 LJ Ch 130; *Devaynes* (n13), noting that these last two cases were decided before *Barnes v Addy* (1874) LR 9 Ch App 244; *Dudley* (n13); *Perham* (n13).

¹⁷ *Harper* (n14), affd on appeal [1887] NSW 116.

¹⁸ *Harper* (n14) 113, see also 107; affd on appeal [1887] NSW 116, 117–18, 120.

¹⁹ *Harper* (n14) 113.

²⁰ *Harper* (n14) 113.

²¹ See n16.

Australian case law that English case law had as binding authority, and continues to have as persuasive authority.²²

A critical aspect of this thesis’ approach is to identify a pattern in the cases that the judges deciding those cases did not, and on occasion to reinterpret a case having regard to the factors set out in the paragraph above. It is submitted that this approach is legitimate because: (i) judges do not necessarily explore all possible analyses in deciding a specific case; and (ii) a pattern may emerge from a line of cases, when read with hindsight and as a whole, that was not apparent to the judge at the time of decision of an individual case.

The significance of this thesis’ approach is that a close analysis of the case law reveals a conceptual architecture within which the claim can be understood. As this Chapter will show, that architecture reveals a stable and consistent pattern according to which the availability of the claim and equity’s response can be understood. The further significance of this approach is to obviate the need to rely on unstable concepts, such as equitable title, to understand the beneficiary’s proprietary claim.

C. The claim is available where there is a non-compliant execution

The aim of this Part C is to demonstrate that the event relevant to the beneficiary’s proprietary claim is a non-compliant execution. To make out this argument, this Part C will show that the claim is available where there has been an exercise of power held subject to an express trust and that exercise fails to comply with one or more of equity’s standards. It will be necessary to navigate and, in some instances, resolve some analytical instabilities concerning the effect of some of these standards, including the proper purposes and bona fides standards.

The analysis in this Part will proceed as follows. Part C.1 will set out the cases demonstrating the availability of the claim where an exercise of power does not satisfy equity’s standards. Part C.2 will explain this thesis’ reliance upon an interpretative analysis in relation to some cases that contain express reasoning that might otherwise undermine the argument in this Chapter. Part C.3 will confront the

²² As recognised in *Cook v Cook* (1986) 162 CLR 376, 390 (Mason, Wilson, Deane and Dawson JJ).

uncertainty regarding the effect of the proper purposes standard (fraud on a power). Finally, Part C.4 will explain how a lack of case evidence of the relationship between the beneficiary’s proprietary claim and the bona fides standard does not necessarily tend against the arguments in this thesis.

1. The beneficiary’s proprietary claim is available when equity’s standards are not met

This Part C.1 considers the cases that demonstrate that the beneficiary’s proprietary claim is available when one or more of equity’s standards are not satisfied. The discussion will consider the cases in relation to each of equity’s standards.

i. Compliance with the terms of the trust mandate

Turning to the cases. A case demonstrating that the beneficiary’s proprietary claim was available when there was an exercise of power that did not comply with the trust terms is *Gadson v Gadson*.²³ In that case, T transferred title to the trust property to X, who was expressly prohibited from receiving trust property under the trust mandate.²⁴ We will return to the form of relief in this case in Part D.1 below.

In *Gadson v Gadson*, X was *expressly prohibited* as a potential object. Cases also demonstrate the availability of the claim where the exercise of power is *not permitted* by the trust mandate, in addition to being expressly prohibited. For example, in *Haldenby v Spofforth*, a trustee mortgaged the trust property without the express power to do so in the trust terms.²⁵ The beneficiary’s proprietary claim was available and, consistent with this Part’s argument, Lord Langdale MR explained that ‘the terms of this will do not authorise a mortgage and therefore the mortgagee has not got a valid title’.²⁶ Similarly, in *Stroughill v Anstey* Lord St Leonards LC expressly stated that the reason for the beneficiary’s proprietary claim in relation to a trustee’s mortgage of trust property was that ‘the trust did not

²³ *Gadson v Gadson* [2003] WASC 48.

²⁴ *Gadson* (n23) [61], [86], [101].

²⁵ *Haldenby v Spofforth* (1839) 1 Beav 390.

²⁶ *Haldenby* (n25) 395. Likewise in *Devaynes* (n13) 91–92, 96.

authorize a mortgage ... the equitable mortgages in question cannot be maintained’.²⁷ Likewise, in *Hermann v Pitt* the availability of the beneficiary’s proprietary claim was expressly conditioned upon there being an investment of trust funds where ‘the trustees *had no power*’.²⁸

Continuing this pattern, there are more cases²⁹ where the beneficiary’s proprietary claim is expressly associated with an exercise of power that is outside the terms of the trust mandate. In addition, there are cases where the beneficiary’s proprietary claim is considered to be available, although not successful owing to a defence or lack of identifiable property, and on the facts there is an exercise of power that is outside the trust mandate, although the relationship between the claim and non-compliance is not expressly drawn in the cases.³⁰

ii. Fidelity to the donor’s purpose

The beneficiary’s proprietary claim is available when an exercise of power does not comply with another of equity’s standards, being fidelity to the donor’s purpose, also referred to as the *proper purposes doctrine* or *fraud on a power*. One group of cases demonstrating this availability are cases which expressly treat B’s claim, where there is an improper exercise of power, *in the same way* as where there is an execution contrary to the terms of the trust mandate.³¹ In *Cloutte v Storey*, Neville J at first instance³² indicated that B’s claim in respect of the fraudulent appointment was similar to a claim where there is an appointment that is contrary to the terms of the mandate. Neville J’s decision was affirmed on appeal,³³ and

²⁷ *Stroughill* (n16) 647.

²⁸ *Hermann v Pitt* (1890) 11 LR (NSW) Eq 294, 298 (Owen CJ in Eq) (emphasis added).

²⁹ See eg: *Cave v Cave* (1880) 15 Ch D 639, 644 (Fry J); *Space Investments Ltd v CIBC Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072, 1073–74; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 [101]–[106] (Lloyd LJ).

³⁰ *Moon v O’Brien* (1924) 42 WN (NSW) 24; *Taylor v London & County Banking Co* [1901] 2 Ch 231; *Thorndike v Hunt* (1859) 3 De G & J 563; *Pilcher v Rawlins* (1872) LR 7 Ch App 259; *Re Montagu’s Settlement Trusts* [1987] 1 Ch 264, 271–72, 276–78; *Allan v Rea Bros Trustees Ltd* [2002] EWCA Civ 85 [45]–[52].

³¹ *Sieff v Fox* [2005] EWHC 1312 [78]; *Pitt v Holt* [2012] Ch 132 [96] (Lloyd LJ); C Harpum, ‘Overreaching, Trustees’ Powers and the Reform of the 1925 Legislation’ (1990) 49 CLJ 277, 280–82.

³² *Cloutte v Storey* [1911] 1 Ch 18, 24.

³³ *Cloutte* (n32).

Farwell LJ found that B had a ‘vested equitable estate’³⁴ which gave her priority over X, a later equitable assignee. This case is the locus of some debate about the effect of fraud on a power, which will be addressed in more detail in Part C.3 below. For now, the point is that this case is further evidence of the availability of the beneficiary’s proprietary claim where there is an improper exercise of power.

In addition, there is another group of cases³⁵ where the beneficiary’s proprietary claim is available where there is an improper exercise of power. These cases do not expressly state that an improper exercise is the same as an exercise contrary to the trust terms, but they nonetheless demonstrate the availability of B’s claim where there is an exercise of power for an improper purpose. For example, in *Wong v Burt*, B was able to assert her equitable interest against X, and while final orders were not made, the Court indicated that in principle X would have been required to repay the traceable substitute of the misapplied funds to the original trustees.³⁶

iii. Bona fides

The beneficiary’s proprietary claim is also available when there is an exercise of power that fails to comply with the bona fides standard. As explained in Chapter 3, the bona fides standard requires the power-holder (being either the trustee or another donee of power, collectively referred to as the ‘*donee*’) to subjectively believe that the exercise of power will benefit the purpose for which power is conferred. The link between the beneficiary’s proprietary claim and the bona fides standard is made on the basis that there is some, if limited, case evidence, as discussed now in this Part C.1.iii.

³⁴ *Cloutte* (n32) 32.

³⁵ See eg: *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84; *Lane v Page* (1754) Amb 233; *Aleyn v Belchier* (1758) 1 Eden 132, 138; *Wellesley v Earl of Mornington* (1855) 2 K & J 143; *Re Marsden’s Trust* (1859) 4 Drew 594; *Daubeny v Cockburn* (1816) 1 Mer 626; *Farmer v Martin* (1828) 2 Sim 502; *Duke of Portland v Topham* (1864) 11 HL Cas 32; *Pryor v Pryor* (1864) 2 De GJ & S 205; *Re Crawshay* [1947] Ch 356, affd on appeal [1948] Ch 123; *Re Simpson*; *Chadderton v Simpson* [1952] Ch 412, 417; *Dick v Dick* [1953] Ch 343; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862; *Roadchef (Employee Benefits Trustees Ltd) v Hill* [2014] EWHC 109. See also: *Gilbert v Stanton* (1905) 2 CLR 447, where the only basis for B’s claim was fraud on a power, but which was not established on the facts.

³⁶ *Wong v Burt* [2004] NZCA 174 [42]–[44], [59].

A supporting case is *Dowager Duchess of Sutherland v Duke of Sutherland*.³⁷ In that case, the beneficiary’s proprietary claim was available where there was an exercise of power that failed to meet the bona fides standard. Romer J found that the purported exercise of power was invalid and ‘cannot stand’ because the donee ‘did not have regard to the interests of all the parties entitled under the settlement ... [and purported to exercise the power] not ... for the benefit of the settled estate’.³⁸ In this case, the claim operated to defeat the plaintiff’s proprietary claim which asserted an interest under the purported appointments. This Chapter will return to the operation of the claim as a defence in Part D.5 below. The key point for now is that non-compliance with the bona fides standard meant that B could rely on the beneficiary’s proprietary claim to defeat the plaintiff’s proprietary claim.³⁹

Turner v Turner lends *some* support to this thesis’ claim as to the relationship between the beneficiary’s proprietary claim and non-compliance with the bona fides standard.⁴⁰ In this case, T executed documentation purportedly in exercise of a power of appointment. T was actually unaware of the existence of any discretionary power and signed the documentation at the request of the settlor.⁴¹ Mervyn Davies J identified the problem with the exercise of power as being that ‘the trustees never applied their minds at all to the exercise of the discretion’,⁴² and there ‘was a total failure on the part of the trustees to consider whether or not [they] ought’⁴³ to have exercised their powers of appointment.⁴⁴ The label applied to this failure was not the label used in this thesis, the bona fides standard. It is submitted, however, that in substance, the express reason for recognising the proprietary claim in this case was the same as that referred to as non-compliance with the bona fides standard.

³⁷ *Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch 169.

³⁸ *Dowager Duchess of Sutherland* (n37) 187, 191–93 (Romer J).

³⁹ The Duke’s lack of bona fides also meant that powers incorporated from the Settled Lands Act 1882 (Eng) had not been effectively exercised: *Dowager Duchess of Sutherland* (n37) 187, 193ff.

⁴⁰ *Turner v Turner* [1984] Ch 100.

⁴¹ *Turner* (n40) 107.

⁴² *Turner* (n40) 111.

⁴³ *Turner* (n40) 111.

⁴⁴ *Turner* (n40) 111.

In relying upon *Turner v Turner* as evidencing a link between the beneficiary’s proprietary claim and the bona fides standard, it is necessary to acknowledge two challenges. First, Mervyn Davies J did find that T acted in ‘good faith’.⁴⁵ This finding should not, however, undermine this Chapter’s argument because, as explained in Chapter 3, the label ‘good faith’ can encapsulate different concepts. In this case, Mervyn Davies J used the term to encompass a different concept to that of the bona fides standard. The reference to good faith meant a lack of dishonesty, which is different to the bona fides standard. The bona fides standard requires the donee to have formed a belief as to the end for which power is exercised.⁴⁶ In order to form this conscious belief, it is necessary for the donee to know about the existence of the power, and to consciously have considered its exercise and the end for which it is held.⁴⁷ The trustees had clearly failed to meet this standard, and this failure was expressly recognised by Mervyn Davies J, as is evident from the statements excerpted above.

Second, the plaintiffs in *Turner v Turner* were the trustees, not B. However, as will be explained in Chapter 7, the equity asserted by the ‘beneficiary’s’ proprietary claim can accrue to T, as this case exemplifies.

A similar failure to consciously consider the exercise of power gave rise to the beneficiary’s proprietary claim in *Wilson v Turner*.⁴⁸ This case was later expressly aligned with *Turner v Turner* on the basis that both cases concerned an exercise of power that was ineffective because the donee ‘wholly failed to exercise a discretion which they were required to exercise’.⁴⁹

In summary, it is submitted that on the basis of the cases discussed in Parts C.1.i–iii above, the beneficiary’s proprietary claim should be understood as available where there is a non-compliant execution as that event has been identified in Chapter 3. However, it is necessary to address, and in some instances resolve, some conceptual instabilities; this is the focus of the following Parts C.2–4.

⁴⁵ *Turner* (n40) 110.

⁴⁶ *Cock v Smith* (1909) 9 CLR 773, 794, 800–02 (Griffiths CJ), 807–10 (O’Connor J).

⁴⁷ *Cock* (n46) 794, 800–02 (Griffiths CJ), 807–10 (O’Connor J).

⁴⁸ *Wilson v Turner* (1883) LR 22 Ch D 521.

⁴⁹ *IMG Pension Plan HR Trustees Ltd v German* [2009] EWHC 2785 [218]–[220].

2. Cases that rely on equitable title

The arguments in Part C.1.i above rely upon cases where the express reasoning provides some evidence of a link between the beneficiary’s proprietary claim and non-compliant execution. There are also cases which, having regard to the express reasoning alone, do not directly support this link, but can be interpreted as being consistent with the pattern observed in Part C.1 above.

An illustrative example is *Foskett v McKeown*, where the House of Lords expressed the availability of the claim as arising due to a ‘breach of trust’ and to ‘vindicate’ the beneficiary’s equitable title.⁵⁰ The problems with the vindication of title approach have been discussed in Chapter 2. Chapter 5 will demonstrate that, while a breach of trustee duty may coincide with an exercise of power contrary to the trust terms, breach is not the relevant event or reason why the claim is available.

It is submitted that *Foskett v McKeown* should be understood as evidence that the beneficiary’s proprietary claim is available in response to an exercise of power that is outside the trust mandate. The trustee did not apply the trust funds towards the mandated investment, but used them for the trustee’s personal use. In interpreting this case, it must be acknowledged that the availability of the beneficiary’s proprietary claim was not expressly based on there being an exercise of power outside the sphere of permission defined by the trust mandate. Nonetheless, it is submitted that this interpretation provides a better understanding of the case in light of the difficulties with the express reasoning.

There are further cases⁵¹ where the beneficiary’s proprietary claim is available where there is a non-compliant exercise of power. Like *Foskett v McKeown*, these

⁵⁰ *Foskett* (n15) 108–09 (Lord Browne-Wilkinson), 118 (Lord Hope), 127–30 (Lord Millett).

⁵¹ For example, where: (i) a trustee transfers trust property to a non-object that is not otherwise permitted by the trust mandate, and X is ordered to re-convey property (*Strang v Owens* (1925) 42 WN (NSW) 183, special leave refused *Owens v Strang* (1925) 37 CLR 593; *Presbyterian Church of Victoria Trusts Corp v Anstee* [2017] VSC 102; *Flemming v Page* (1677) Rep Temp Finch 320; *Walley v Walley* (1687) 1 Vern 484; *Phayre v Peree* (1815) 3 Dow 116; *Pearce v Newlyn* (1818) 3 Madd 186; *Boursat v Savage* (1866) LR 2 Eq 134; *A-G v Christ’s Hospital* (1834) 3 My & K 344; *A-G v Compton* (1842) 1 Y & C Ch Cas 417; *A-G v Hall* (1853) 16 Beav 388; *A-G v Earl of Chesterfield* (1854) 18 Beav 596); (ii) a trustee sells trust property in circumstances where the trust mandate does not contain a power of sale, or the conditions are not satisfied, and X is ordered to return the property or its traceable

cases do not expressly state that the claim is available *because* one or more of equity’s standards have not been complied with. The reasoning in these cases, as in *Foskett v McKeown*, is expressed in terms of equitable title, or breach of trust, and is thus flawed for the reasons set out in Chapter 2 in relation to equitable title; this will be discussed in Chapter 5 in relation to breach of trust. Again, it is submitted that this thesis’ interpretation of these cases should be preferred in light of the difficulties with the express reasoning.

In making the argument that fraud on a power and bona fides form part of equity’s standards, it is also necessary to confront some analytical instabilities that surround these doctrines and explain why they do not undermine this thesis. That is the aim of Part C.3 and Part C.4 in relation to fraud on a power and bona fides respectively.

3. Analytical uncertainty re fraud on a power – the void or voidable debate

To corroborate this thesis’ claim as to the relationship between fraud on a power and the beneficiary’s proprietary claim, it is necessary to engage with the debate over whether the effect of fraud on a power is voidness or voidability. If the debate is resolved such that the effect of fraud on a power is *voidability*, this supports the view (contrary to the position taken in this thesis) that the beneficiary’s proprietary claim is *not* available in response to fraud on a power. This debate should not be resolved in favour of voidability, and cases favouring voidability do not derogate from the arguments in this thesis because: (i) equity’s standards, including fraud on a power have multiple effects; so that (ii) the void or voidable framework is problematic.

substitute, and/or the contract for sale is set aside (see eg: *Harper* (n14), affd on appeal [1887] NSW 116; *Perpetual Trustee Co Ltd v Cowan (No 2)* (1900) 21 LR (NSW) Eq 278; *Futter* (n16); *Stuart v Kingston* (1923) 32 CLR 309, not overruled as to existence of the claim where sale contrary to trust terms (1924) 34 CLR 394 ; *Palmer* (n13); *Mansell v Mansell* (1732) 2 P Will 678 SC; *Cory v Eyre* (1863) 1 De GJ & S 149); and (iii) trustee mortgages trust property without permission in trust mandate and mortgagee’s interest is deferred in priority to that of B with consequential orders for relief (*Haldenby v Spofforth* (n25); *Stroughill* (n16); *Devaynes* (n13); *Shropshire Union v R* (1865) LR 7 HL 496; *Dudley* (n13); *Powell v London & Provincial Bank* [1893] 2 Ch 555; *Perham v Kempster* (n13)).

i. Equity’s standards have multiple effects

To demonstrate the multifarious effects of equity’s standards, including fraud on a power, it is necessary to return to the distinction made in Chapter 3⁵² between (i) powers held as an incident of T’s title to property and (ii) powers that are created under the express trust. The significance of this distinction is that equity’s standards have a different effect with respect to these different types of powers. Equity’s standards, including fraud on a power, do confine the scope of and disable the exercise of (ii), being those powers created by an express trust, such as a power of appointment. For the reasons discussed in Chapter 3,⁵³ the terms of these powers mean that they can only be effectively exercised if in compliance with equity’s standards, including a proper purpose. A donee’s improper purpose ‘destroy[s] ... the efficacy of the exercise of the power’.⁵⁴ Cases indicate that B is able to assert the beneficiary’s proprietary claim to seek recovery of property, or to assert priority of equitable title.⁵⁵

By contrast, equity’s standards, including the proper purposes standard, have a different effect in those cases concerning an exercise by T of powers held incident of title.⁵⁶ In cases such as *Wong v Burt*, T’s improper purpose did *not* confine the scope of the power to deal with T’s title and X did receive the traceable substitute of the trust funds. T’s power was not disabled in these cases. Nonetheless, the beneficiary’s proprietary claim was still available. Similarly, in relation to the standard requiring compliance with the terms of the trust mandate, which does not confine the scope of, nor disable exercise of T’s power held incident of title, as demonstrated by cases such as *Gadson v Gadson* and *Foskett v McKeown*.

The multifarious effect is expressly recognised in relation to the bona fides standard in *Turner v Turner* where, *in relation to the power of appointment*, Mervyn Davies J declared ‘there [was] no exercise of the power and the purported appointment is a

⁵² Chapter 3, Part D.2.

⁵³ Chapter 3, Part E.1.ii.b.

⁵⁴ *Re Simpson* (n35) 417.

⁵⁵ See eg: *Redman* (n35); *Lane* (n35); *Aleyn* (n35); *Duke of Portland* (n35); *Pryor* (n35); *Re Crawshay* (n35), affd on appeal [1948] Ch 123; *Re Simpson* (n35) 417.

⁵⁶ See Chapter 3, Part B.1.ii.a.

nullity’.⁵⁷ But *in relation to T’s powers held incident of title*, this was ‘of course effective as a conveyance of the legal estate’.⁵⁸ As will be discussed in more detail in Part D below, the multifarious effect of equity’s standards helps to explain the range of forms of relief available in response to the claim.

ii. Void or voidable framework is problematic

We return now to the void or voidable debate, about which there is conflicting case authority. According to the English Court of Appeal in *Cloutte v Storey*,⁵⁹ and the House of Lords in *Duke of Portland v Topham*,⁶⁰ the relevant effect is voidness. As discussed in Part C.1.ii, these cases demonstrate the availability of the beneficiary’s proprietary claim in response to fraud on a power. Australian cases⁶¹ have relied upon these English cases. However, later English cases⁶² have criticised the voidness approach in favour of the voidability approach including *Pitt v Holt*.⁶³ If these criticisms are accepted, they would undermine the link between an improper purpose and the beneficiary’s proprietary claim.

The position taken in this thesis, and in previous research,⁶⁴ is that once the multifarious effect of fraud on a power is understood, the void or voidable paradigm is not helpful to understanding the effect of fraud on a power. No matter the label used in a given case, the same two patterns emerge as to the multiple effects of fraud on a power as described above, which supports this thesis’

⁵⁷ *Turner* (n40) 111.

⁵⁸ *Turner* (n40) 111.

⁵⁹ *Cloutte* (n32) 30–32.

⁶⁰ *Duke of Portland* (n35) 54.

⁶¹ See eg: *Gilbert* (n35) 460 (the Court); *Cock* (n46) 793; *Redman* (n35) 93–94; *Australian Super Pty Ltd v Woodward* [2009] FCAFC 168 [38] (the Court); *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 [149]; *Macarthur Cook Real Estate Funds Ltd v APN Funds Management Ltd* [2013] VSCA 240 [22].

⁶² See eg: *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409 [31].

⁶³ See eg: *Pitt v Holt* [2013] 2 AC 108 [62] (Lord Walker); R Walker, ‘The Limits of the Rule in *Re Hastings-Bass*’ [2002] PCB 226, 231; M Ashdown, *Trustee Decision Making: The Rule in Re Hastings-Bass* (OUP 2015) [9.08]–[9.13], [9.20]–[9.42].

⁶⁴ J Hudson and C Mitchell, ‘The Legal Consequences of the Flawed Exercise of Pension Scheme Powers’ (WG Hart Workshop for 2019 on Pensions: Law, Policy & Practice, University College London, 20–21 June 2019); J Hudson, ‘One Thicket in Fraud on a Power’ (2019) 39 OJLS (advance online access) <<https://doi.org/10.1093/ojls/gqz017>>.

argument that the beneficiary’s proprietary claim *is* available in response to fraud on a power.

Observe that in cases concerning T’s powers held as an incident of title, such as *Wong v Burt*, it is not possible to describe the effect of fraud on a power as being absolutely void or voidable, and further, both void and voidable are at once potentially applicable. The purported exercise of the power of appointment is void in the sense that it is disabled by the improper purpose. However, the exercise of power held incident of title to the trust property is not disabled by the improper purpose. Voidness is not applicable as there is an effective exercise of this power.

Voidability could be used to describe what is *prima facie* an effective transaction, but which is susceptible to relief via the beneficiary’s proprietary claim. To the extent this is so, it demonstrates how one transaction potentially attracts both labels. However, voidability is also problematic because, properly understood, that term connotes an equity to set aside a transaction that ranks as a mere equity in terms of equitable priorities.⁶⁵ As will be shown in Chapter 6, the beneficiary’s proprietary claim (including that in cases where there is a fraud on a power) is *not* a mere equity, but an equitable estate. Hence the difficulties with the voidability approach as well.

Thus, this thesis has not sought to resolve the debate over whether the effect of fraud on a power is voidness or voidability. Rather, regard is had to the substantive effect of fraud on a power, and equity’s other standards, in terms of whether a purported exercise of power is or is not effective to vary the parties’ legal relations. On this approach, it is possible to observe the two consistent patterns in the cases described above in Part C.3.i, both of which are consistent with this thesis’ observation that the beneficiary’s proprietary claim is available where equity’s standards are not satisfied, including where there is a fraud on a power.

4. Analytical uncertainties concerning the bona fides standard

The final issue that will determine the availability of the beneficiary’s proprietary claim relates to the bona fides standard. As mentioned already, there are few cases directly considering the availability of the beneficiary’s proprietary claim and this

⁶⁵ *Independent Trustee Services* (n29) [104] (Lloyd LJ); D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) [1.57]–[1.69].

standard. This lack of case evidence should not necessarily tend against this thesis’ argument that the claim is available where there is non-compliance with the bona fides standard, because: (i) there is some conceptual and factual concurrency between bona fides and the requirement for a proper purpose; and (ii) strategic advantages are offered by fraud on a power.

i. Potential concurrency of the bona fides and proper purposes standards

As discussed in Chapter 3, there is some conceptual and factual concurrency between bona fides and the requirement for a proper purpose because both standards are concerned with the donee’s subjective purpose.⁶⁶ This point is implicit in those statements in which these standards are expressed conjunctively, such as in *Duke of Portland v Topham*, where the principle is stated that power must be exercised ‘with good faith and sincerity, and with an entire and single view to the real purpose and object of the power’.⁶⁷ The significance is that facts which demonstrate non-compliance with the bona fides standard will also *necessarily* demonstrate non-compliance with the proper purposes standard (fraud on a power). If there is a lack of bona fides, there must also be an improper purpose. For example, in *Cloutte v Storey*, the donees acted with the subjective purpose of benefiting themselves and thus did not act in what they perceived to be the subjective best interests of the appointee.⁶⁸ The significance of this potential concurrency is that, for reasons discussed next, where facts demonstrate an execution that fails both standards, there are certain strategic advantages offered by relying on fraud on a power rather than a lack of bona fides.

However, these concepts are not co-extensive and remain conceptually distinct, and thus are treated separately in this thesis. It is possible for an exercise of power to satisfy the bona fides standard but not satisfy the proper purposes standard. T, for example, may exercise a power of investment in a manner she believes benefits the object by investing in ethical or morally responsible investments, but such an

⁶⁶ Chapter 3, Part E.1.i.c.

⁶⁷ *Duke of Portland* (n35) 54 (emphasis added).

⁶⁸ *Cloutte* (n32).

execution might be improper if it is not directed to achieving financial returns.⁶⁹ Similarly, in *Duke of Portland v Topham*, the donee acted bona fide in what he believed was the best interests of his daughter, but the appointment nonetheless did not satisfy the proper purposes standard.⁷⁰

ii. Strategic advantages offered by fraud on a power

There are two strategic advantages offered by fraud on a power, so B may choose to rely on a fraud on a power alone, and not plead non-satisfaction of the bona fides standard: (a) fraud on a power does not always require B to prove the donee’s actual subjective intention; and (b) proving non-compliance with the bona fides standard may pose a greater burden on B than proving fraud on a power. These advantages provide one reason why a lack of case evidence regarding the bona fides standard does not necessarily derogate from this Chapter’s arguments.

a. Fraud on a power does not always require B to prove the donee’s actual subjective intention

Fraud on a power does not always require B to prove the donee’s actual subjective intention, whereas for B to make out non-compliance with the bona fides standard, she must.⁷¹ *Fraud on a power* can be made out where it can be shown that the exercise of the power, in the circumstances, could not have been for a proper purpose.⁷² In such a case, B does not have to actually prove the donee’s subjective purpose, and the donee’s subjective intention can be inferred from the objective or circumstantial matters.

b. Proving non-compliance with the bona fides standard may impose a greater burden on B than proving fraud on a power

Establishing non-compliance with the bona fides standard may impose a greater forensic burden on B than proving fraud on a power. B can prove non-satisfaction of the bona fides standard in two ways. One way is to show that the donee failed

⁶⁹ See eg: *Cowan v Scargill* [1985] Ch 270 287–88 (Megarry VC); *Harries v Church Comrs* [1992] 1 WLR 1241 1246–48 (Nicholls VC).

⁷⁰ *Duke of Portland* (n35) 60.

⁷¹ Aside from the scenario where B can show that the donee failed altogether to appreciate the existence of the power or had no real and genuine consideration, as in *Turner* (n40).

⁷² *Hancock v Rinehart* [2015] NSWSC 646 [60]–[61] (Brereton J).

altogether to appreciate the existence of the power or gave no real and genuine consideration to it, as in *Turner v Turner*.⁷³ The other, if B cannot show a complete lack of consideration on the donee’s part, is to prove that the donee did not subjectively believe the exercise would further the purpose of the power, for example by benefiting the intended object. This effectively requires B to prove bad faith which by its nature may alter ‘the strength of the evidence necessary to establish a fact or facts on the balance of probabilities’.⁷⁴ B may instead decide to plead and prove fraud on a power, as it does not impose these additional pleading and evidential burdens.

It is submitted that, in light of these observations on the potential strategic advantages offered by reliance upon fraud on a power, the lack of case evidence of the link between the beneficiary’s proprietary claim and the bona fides standard does not necessarily tend against this thesis’ argument for the relationship between the bona fides standard and the beneficiary’s proprietary claim.

D. Remedial response(s) to the beneficiary’s proprietary claim

This Part D considers the remedial responses to the beneficiary’s proprietary claim. These remedial responses will be discussed in this Part with a view to showing that, despite the variations, there is a common theme or overall pattern as to the effect of remedial relief, which is to place B in the position as if the non-compliant exercise of power had not occurred. Further, as discussed in Part D.1.i below, it will be possible to provide a more accurate account of this overall pattern by using a concept introduced in Chapter 3 which is the *disability-immunity* relationship.

It must be acknowledged that there is some analytical instability in the cases and academic commentary about the remedial response to the beneficiary’s proprietary claim. This instability itself intersects with a broader debate about the availability of, and reasons for, proprietary restitution.⁷⁵ Of relevance to the

⁷³ Likewise in *Cock* (n46) 794, 800–02 (Griffiths CJ), 807–10 (O’Connor J).

⁷⁴ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66 [2]; *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 [3].

⁷⁵ There is much literature covering this debate, but a small sample includes: C Rotherham, *Proprietary Remedies in Context* (Hart Publishing 2002); L Smith, ‘Unravelling Proprietary

discussion here is whether the remedial response to the beneficiary’s proprietary claim should be understood as a *constructive trust*, and if so in what sense,⁷⁶ or as a *resulting trust*.⁷⁷ Despite the division over the label applied, both sides of this debate are unified as to the form of relief in response to the beneficiary’s proprietary claim and accept that the trust is a shorthand for orders requiring the transfer of title to specific property.⁷⁸ Neither side contends that the trust is one that imposes further obligations on X, such as the constructive trust in response to the separate claim in knowing receipt.⁷⁹

This thesis has not sought to resolve the debate about the labels of a resulting or constructive trust. This is because the evidence in the cases demonstrates that there is a range of forms of orders for relief, which are: (1) for the transfer of specific

Restitution’ (2004) 40 CBLJ 317, 337; L Smith, ‘Philosophical Foundations of Proprietary Remedies’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of Unjust Enrichment* (OUP 2013) ch 10.

⁷⁶ The different meanings of constructive trust have been examined before, see eg: P Millett, ‘Restitution and Constructive Trusts’ in W Cornish, R Nolan, J O’Sullivan and G Virgo (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing 1998) 199–201; L Smith, ‘Transfers’ in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 137–38; S Worthington, ‘Exposing Third-Party Liability in Equity’ in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) ch 14. The problems with this nomenclature have been observed in: W Swadling, ‘The Fiction of the Constructive Trust’ (2011) CLP 1, 10–13; E Bant and M Bryan, ‘Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials’ (2011) 5 J Eq 171; E Bant and M Bryan, ‘Specific Restitution without Trusts’ (2012) 6 J Eq 181, 183–88.

⁷⁷ A sample of different views are given in: *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 716; *Foskett* (n15) 108, where Lord Browne Wilkinson rejected both a resulting trust and a constructive trust as the appropriate form of remedy, although different views were expressed by Lord Hoffman, at 111, and Lord Millett, at 144–45, as to the label for relief in this case. The existence of this issue is observed in: *Independent Trustee Services* (n29) [79]–[83] (Lloyd LJ); *Nabb Bros Ltd v Lloyds Bank International (Guernsey) Ltd* [2005] EWHC 405 [72] (Lawrence Collins J).

⁷⁸ Use of the label ‘constructive trust’ to describe orders akin to a conveyance of property is discussed in: *Giumelli v Giumelli* (1999) 196 CLR 101 [5] (Gleeson CJ, McHugh, Gummow and Callinan JJ). See further: Swadling, ‘The Fiction of the Constructive Trust’ (n76); W Swadling, ‘The Nature of Knowing Receipt’ in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 309–10; Bant and Bryan, ‘Specific Restitution without Trusts’ (n76) 183–84.

⁷⁹ See also: Millett (n76) 200. Nor is it suggested that the trust is akin to a resulting trust in the sense that it is rebuttable by proof of the donee’s ‘true intention’.

property; (2) payment of the value of specific property; (3) equitable liens and subrogation; (4) declarative and injunctive relief; and (5) that the claim also operates as a defence. These variations are discussed below and reflect the ‘cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and particular facts’.⁸⁰ Remedial flexibility is required because, as discussed in Chapter 3 and Part C.3.i above, non-compliance with equity’s standards can have different effects. Sometimes non-compliance confines the scope and disables the exercise of a power, but sometimes it does not. Thus, the relief necessary to address a non-compliant execution varies.

The facets of this pattern of equity’s response are discussed now with a view to showing that, in addition to the variations, there is an overarching theme as to the extent of B’s equity for relief, which is for relief *that is necessary to place B in the position as if the non-compliant exercise of power had not occurred*. The significance of this argument is that it lays the foundations for this thesis’ argument as to the function and aim of the beneficiary’s proprietary claim in Chapter 9. Further, the arguments in this Part D will inform the analysis in Chapter 6 as to the nature and content of B’s interest asserted by the claim and X’s responsibility.

1. Transfer of specific property

As has been observed before, one form of relief in response to the beneficiary’s proprietary claim is an order requiring X to transfer title to trust property or its traceable substitute to the trustee⁸¹ (or replacement trustee). This was expressly recognised by the Court of Appeal of New South Wales in *Perpetual Trustee Co Ltd v Cowan* where it stated: ‘the ... remedy of the cestui que trusts ... is to compel [the recipient] to restore the estate to the original trust. That, no doubt, is the ultimate remedy’.⁸² An example is *Gadson v Gadson*, mentioned above in Part C.1.i, where X was ordered to hold title to the trust property (land) on constructive trust, pending orders requiring the transfer of title to a new trustee.⁸³

⁸⁰ *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559 (the Court).

⁸¹ *Akers v Samba Financial Group* [2017] AC 424 [46].

⁸² *Perpetual Trustee Co* (n51) 300 (Darley CJ, Owen and Cohen JJ).

⁸³ See eg: *Gadson* (n23) [101].

This pattern is repeated in other cases⁸⁴ where the relief awarded or recognised as being available in response to the beneficiary’s proprietary claim is an order(s) requiring X to transfer property to the trustee (sometimes a replacement trustee). As mentioned already, there is variance as to the label applied to this form of relief; sometimes the label ‘trust’ is employed in the form of relief and sometimes it is not. Further, and as will be discussed below in Part D.1.ii, sometimes the property is that originally subject to the non-compliant execution, and sometimes it is the traceable substitute. The important point is that, in substance, the response is the same: X is required to transfer title to specific property to T.

Critical to this thesis’ argument is the observation that the effect of the response is to place B in the position as if the non-compliant exercise of power had not occurred, having regard to *B’s interest against T under the trust*. Recall from Chapter 3 that B’s interest against T can be affected by a non-compliant exercise of power, for example where T transfers title to trust property to X so that B’s interest is no longer annexed to *T’s title*. Once X complies with the orders for relief and reconveys title to T, T has title to the subject property. B’s interest now relates to that property, and B’s interest is thus restored to the position, or as near to it as possible in relation to a claim for recovery of traceable substitutes, prior to the non-compliant exercise.

i. [A digression: using the disability-immunity relationship to understand the effect of relief](#)

So far, this thesis has described the overall pattern of the effect of relief as being to place B in the position she would have occupied if the non-compliant exercise of power had not occurred. Having observed one facet of the pattern in the form of response to the beneficiary’s proprietary claim, it is now possible to explain the

⁸⁴ A sample includes: *Futter* (n16); *Stuart* (n51) 326–27, overruled on other issues (1924) 34 CLR 394; *Strang* (n51); *Chong v Chanell* [2009] NSWSC 765 [28]–[29]; *Dudley* (n13); *Re Montagu’s Settlement Trusts* (n30) 276–78; *Hillsdown* (n35) [114]; *Foskett* (n15) 108, 111, 144–45; *Allan* (n30) [45]–[52]; *Independent Trustee Services* (n29) [80]–[81]; *Roadchef (Employee Benefits Trustees Ltd)* (n35) [178]–[179]; *Wong* (n36) [43], [59].

effect of relief in more accurate terms. This is done by using a concept introduced in Chapter 3,⁸⁵ which is the *disability-immunity* relationship.⁸⁶

As discussed in Chapter 3, a *disability* refers to the limit or non-existence of a power such that a donee does *not* have the ability to effect some change to an object’s legal relations. Correlatively, an *immunity* refers to the object’s freedom from liability to exercise of the donee’s power.

Chapter 3 explained that a purported execution of a power created under an express trust, such as a power of appointment, that fails to comply with equity’s standards, is *ineffective* to vary the trust terms and the parties’ rights and obligations as defined by those terms. The scope of these powers is confined by compliance with equity’s standards. These powers are thus disabled by non-compliance, and B’s interest against T is correlatively immune from a non-compliant execution. The beneficiary’s proprietary claim asserts B’s equity for relief necessary to give effect to that disability-immunity relationship, such as declaratory relief, discussed further in Part D.4 below.

However, and as discussed in Chapter 3, not all powers held subject to an express trust are disabled by non-compliance with equity’s standards. In the cases such as *Foskett v McKeown*⁸⁷ and *Gadson v Gadson*,⁸⁸ non-compliance with equity’s standards did not actually disable the exercise of the trustee’s powers held incident of title, and B’s interest against T under the trust was not immune. In all these cases, X did receive title to the trust property and B’s interest against T was changed because T no longer had title. These cases show that an exercise of T’s power held incident of title *is effective* to vary the parties’ rights *despite non-compliance*. Equity’s standards do not confine the scope of these powers. Thus, it is not possible to say that equity’s standards impose an actual disability-immunity relationship. Nonetheless, the concept of the disability-immunity relationship remains relevant as it can be used to understand the effect of relief in response to the beneficiary’s proprietary claim.

⁸⁵ See Chapter 3, Part E.1.iii.

⁸⁶ W Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale LJ 16, 55–58.

⁸⁷ *Foskett* (n15).

⁸⁸ *Gadson* (n23).

Where there is a non-compliant exercise by T of her powers held incident of title, as explained above, T’s power is *not disabled*, and B’s interest against T is not *immune* from the non-compliant exercise. The best that equity can do is to recognise an equity for relief, so that it is *as if* T had been disabled by, and *as if* B’s interest against T was immune from, the non-compliant execution. This is demonstrated by *Gadson v Gadson*, where X is required to return subject property to T. Once the requirement is complied with, it is possible to say that the effect of relief is to place B in the position *as if* her interest had been immune from the non-compliant execution, and *as if* T had been disabled.

The significance of using the concept of a disability-immunity relationship is thus more precisely to describe the extent of B’s equity for relief in response to the beneficiary’s proprietary claim. B’s equity is for relief necessary so that it is *as if* there had been an actual disability-immunity relationship. We will return to this point in Chapter 6, where it will be argued that the substantive legal relationship that the claim recognises, and to which relief gives effect, is this disability-immunity relationship, rather than a duty-right relationship.

Further, the idea of a disability-immunity relationship makes clear what is, and is not, the anchor point for assessment of ‘B’s position’ to which she is to be restored. For example, relief is not assessed by reference to B’s personal financial position. Rather, relief is that measure necessary to reinstate the trust estate so that B’s interest under the trust is restored to the same, or substantially the same, position held, for example where there is a claim to a traceable substitute, prior to the non-compliant exercise.

Variations in factual circumstances, and the type of power, might require different orders to satisfy B’s equity. The rest of this Part D will outline these differences with a view to showing that, despite the differences, the cases reveal the same basic pattern as to the effect of relief – which is for relief that is necessary to place B in the position as if the donee had been disabled by, and B’s interest against T immune from, the non-compliant execution.

ii. Traceable substitutes

As mentioned already, there is an important variation in the cases where X is required to transfer specific property, which relates to the type of property to be

returned. In *Gadson v Gadson*,⁸⁹ the property returned was the property originally dealt with by the non-compliant exercise of power and which could be followed from T to X (referred to as the *original property*). In other cases, the property that X is required to transfer to T is the *traceable substitute* of the original property. For example, in *Foskett v McKeown*, X was required to transfer the traceable substitute of the original property in answer to B’s claim.⁹⁰ This pattern repeats in other cases,⁹¹ where X is required to return the traceable substitute, not the original property. In these instances, it is not possible to say B’s position is restored to exactly the same position as if her interest were immune from the non-compliant exercise of power. That would require the return of the property originally subject to the non-compliant execution. However, it is possible to say that B’s position is restored as near as possible to that held prior to the non-compliant exercise of power.

The significance of the extension of the claim to the traceable substitute cannot be overstated. This feature is considered in terms of its effect on X’s responsibility in Chapter 6. That Chapter also considers the analytical instability of the process of tracing. Further, there are important questions why the law should permit the beneficiary’s proprietary claim to be made against the traceable substitute, which are considered in Chapter 9. The points for now are, first, that cases demonstrate the availability of the beneficiary’s proprietary claim in relation to traceable substitutes, and second, the effect of this extension is that B will be placed in as near a position as if the non-compliant execution had not occurred, or in Hohfeldian terms, as if non-compliance had imposed an actual disability-immunity relationship.

iii. To whom property is returned

Another variant in the form of response to the claim relates to the person *to whom* X must return the property. This Part D has argued that the extent of B’s equity is for relief necessary to place B in the position as if her interest was immune from

⁸⁹ *Gadson* (n23).

⁹⁰ *Foskett* (n15).

⁹¹ See also: *Strang* (n51); *Dudley* (n13); *Hillsdown Holdings* (n35); *Independent Trustee Services* (n29); *Wong* (n36).

the non-compliant exercise. Support for this argument is drawn from those cases where X is required to return the subject property to T. However, in some cases, such as *Strang v Owens*⁹² and *Foskett v McKeown*,⁹³ X was required to return property to B. In *Topham v Duke of Portland*,⁹⁴ X was required to repay part of the appointed sum to T, and some to B.

It is submitted that this variation does not detract from the argument being made in this thesis. Those cases where X is required to return property to B involve the interplay of another phenomenon: B’s power to require the trustee to transfer title to the trust property to B.⁹⁵ In *Duke of Portland v Topham*, for example, B was absolutely entitled to part, not all, of the sum appointed to X. Hence, X was required to return some of the property to B in respect of which she was absolutely entitled, and return the other portion to T. The significance is that the final orders in *Duke of Portland v Topham* and *Foskett v McKeown* and *Strang v Owens*, effectively collapse two claims: (i) the beneficiary’s proprietary claim, and consequent remedies requiring return to the trustee; and (ii) the beneficiary’s exercise of her power to call for trust property from the trustee, and consequent relief.

The precise form of the remedy in these cases short-circuits the steps of requiring X to return property to T (the beneficiary’s proprietary claim), B to exercise her power to direct T to transfer property and T to comply with that request. The distinction between these phenomena has been recognised before, for example in *Akers v Samba Financial Group* where, in the context of considering the nature of the beneficiary’s right under a trust, Lord Mance explained that ‘the beneficiary has only the right to have the trust assets restored to the original trustee, or, if the trust was a bare trust to which the rule in *Saunders v Vautier*, applies, to himself’.⁹⁶

It is thus submitted that the cases where X must return property to B can be understood as evidencing the same overall pattern according to which the effect of

⁹² *Strang* (n51).

⁹³ *Foskett* (n15).

⁹⁴ *Topham v Duke of Portland* (1863) 1 De GJ & S 517, 576–78, affd on appeal in *Duke of Portland* (n35).

⁹⁵ *Saunders v Vautier* (1841) Cr & Ph 240; *CPT Custodian Pty Ltd v Comr State Revenue* (2005) 224 CLR 98 [43]; *Beck v Henley* [2014] NSWCA 201 [32]–[44].

⁹⁶ *Akers* (n81) [46], [82]. See also: Smith (n76) 136; Smith, ‘Unravelling Proprietary Restitution’ (n75) 321; R Nolan, ‘Equitable Property’ (2006) 122 LQR 232, 237, 243–50.

relief is to place B in the position as if the non-compliant execution had not occurred, and as if her interest were immune from the non-compliant exercise. This pattern is only revealed once we look past the final form of the orders and take account of the impact of additional phenomena such as B’s power to call for the trust property.

2. Payment of the value of specific property

A further variation is that sometimes X is required to pay a monetary sum, rather than transfer title to specific property, in response to the beneficiary’s proprietary claim.⁹⁷ This variation might be understood as a different phenomenon altogether, for example a personal claim for restitution.⁹⁸ Thus, it is necessary to explain why this thesis treats these cases as the beneficiary’s proprietary claim. The further significance of these cases is that they demonstrate the flexibility in remedial response to the beneficiary’s proprietary claim. To make these arguments, it is necessary to distinguish between two categories of cases. First are those cases where the specific property the subject of B’s claim is in some monetary form, such as currency, or is intangible property, such as a chose in action constituted by a bank account. Second are the cases where X is required to repay a monetary sum in lieu of transferring title to property. Each category, and the reasons why they are part of the same overall pattern of response to the beneficiary’s proprietary claim, is discussed in turn.

i. Type of property subject to B’s claim

First there are cases where X is required to repay a sum of money because of the type of property received by X. For example, in *Dudley v Champion*, X was not ordered to convey title to specific property, but ordered ‘to pay into Court the residue of the sum of £300’.⁹⁹ The English Court of Appeal affirmed North J’s decision and orders.¹⁰⁰ Despite this variation, the express reasoning indicates that it is part of the phenomenon of concern to this thesis. B’s claim arose because T’s dealing with trust property was ‘not authorised’ and the sale proceeds ‘belonged

⁹⁷ See eg: *Dudley* (n13); *Topham* (n94) 576–78, affd on appeal in *Duke of Portland* (n35).

⁹⁸ Discussed in Chapter 1.

⁹⁹ *Dudley* (n13) 115–16.

¹⁰⁰ *Dudley* (n13) 115–16.

beneficially¹⁰¹ to the trust estate.¹⁰² North J found that B was able to elect¹⁰³ to claim the sale proceeds rather than follow the land (the purchaser was likely a bona fide purchaser for value without notice).¹⁰⁴ Likewise, in *Duke of Portland v Topham*,¹⁰⁵ T had transferred trust funds under improper appointments. X was not ordered to convey title to specific property, but ordered to repay the equivalent sums of money.

The form of relief in *Dudley v Champion* and *Duke of Portland v Topham* elides the difference between a personal and proprietary remedy. No matter whether the *remedy* is characterised as personal or proprietary, the remedy is awarded in response to the beneficiary’s proprietary *claim*. The existence of a personal remedy does not detract from the proprietary nature of the claim.¹⁰⁶ It is submitted that despite the variation in the remedy, these cases form part of the same pattern observed so far: that the nature and extent of B’s equity is for relief that is necessary to place B in the position, or near enough, as if the non-compliant execution had not occurred. The flexibility in the form of equitable relief is necessitated by the varied fact patterns in relation to the form of property received by X.

ii. Specific relief not possible

Second is the scenario where X is required to repay a monetary sum in lieu of transferring title to property. The reason for the variation is that, in the circumstances, the transfer of specific property is not possible. An example is *Harper v Brown*, where T transferred title to the trust property to multiple co-owners ‘in a manner not authorised by the trust deed’.¹⁰⁷ Some of the co-owners

¹⁰¹ *Dudley* (n13) 112.

¹⁰² *Dudley* (n13) 112–13.

¹⁰³ The significance of B’s ability to elect to claim against the original or traceable substitutes is considered further in Chapter 6.

¹⁰⁴ *Dudley* (n13) 113 (North J).

¹⁰⁵ *Topham* (n94) 576–78, affd on appeal in *Duke of Portland* (n35).

¹⁰⁶ A similar point has been made before, see eg: *Trustee of the Property of FC Jones & Sons v Jones* [1997] Ch 159, 168; Virgo (n5) 558; K Mason, J Carter and G Tolhurst, *Mason and Carter’s Restitution Law in Australia* (3rd edn, LexisNexis 2016) [235], [302].

¹⁰⁷ *Harper* (n14) 114 (Manning PJ), affd on appeal [1887] NSW 116, 120–21 (Faucett, Innes and Stephen JJ).

could make out the plea of bona fide purchaser,¹⁰⁸ thus precluding orders for transfer of title to the subject property. Manning PJ¹⁰⁹ ordered those co-owners who could not make out the plea to pay the value of their interest in the subject property.¹¹⁰ Despite the variation in form, these cases present the same pattern observed so far: that the nature and extent of B’s equity is for relief that is necessary to place B in the position, or as near enough, as if the non-compliant exercise had not occurred.

It is acknowledged that there is an ongoing debate about the existence and parameters of the distinct personal claim for restitution of the value of property.¹¹¹ This thesis does not engage further with that debate. This is because the cases referred to in this Part D.2 are not part of this other phenomenon, and expressly indicate they concern the availability of a personal remedy in response to the beneficiary’s proprietary claim. The variation as to the personal remedy can be accounted for on the basis that it is a monetary substitute¹¹² for specific relief which is necessary to fashion equity’s response to fit the facts of the case.

3. Equitable lien and subrogation

A further variation in the pattern of response is where X is ordered to repay a sum of money which is secured by a lien over the subject property.¹¹³ The availability of a lien over orders requiring reconveyance of specific property is expressly acknowledged in the case law, and B is able to choose the most advantageous

¹⁰⁸ *Harper v Brown* (n107) 120–21.

¹⁰⁹ PJ stands for ‘Primary Judge in Equity’ which is the title that pre-dates ‘Chief Judge in Equity’; see further, M Leeming, ‘Equity and Trusts: The Primary Judge in Equity’ (2016) 90 ALJ 783.

¹¹⁰ *Harper* (n14) 114 (Manning PJ), affd on appeal [1887] NSW 116, 121–22 (Faucett, Innes and Stephen JJ). On appeal the Court changed the date for valuation of the defendants’ interests in the coal mine to the value as at the date of sale, not present value at date of decree.

¹¹¹ Discussed in Chapter 1, Part C.1.iii.

¹¹² An explanation countenanced in C Mitchell, P Mitchell & S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [8-141].

¹¹³ This was the case in *Cave* (n29) 646–47; *Austin v Khaliffe* [1966] 2 NSW 632. The availability of the claim, but not the form of relief in this case, was questioned in *Fistar v Riverwood Legion & Community Club Ltd* (2016) 91 NSWLR 732 [72]–[80].

remedy¹¹⁴. Despite the variation in the particular form of remedial response, the same overall pattern as to the effect of relief pertains. B is restored to as near a position as possible as if the non-compliant exercise had not occurred. After X complies with the orders, T has title to the funds received by X, and to which B’s interest affixes. B’s position is thus restored to as near a position as possible prior to the non-compliant exercise.

It is important to acknowledge a further deviation within this category of response, which occurs where a lien or charge is awarded *by way of subrogation*, in response to the beneficiary’s proprietary claim. One case is *Boscawen v Bajwa*, where a charge was awarded in B’s favour by way of subrogation to a previous charge that had been repaid with funds identified as the traceable substitute of trust funds.¹¹⁵ Having regard to the express reasoning in this case, there is some uncertainty whether it represents subrogation in response to the beneficiary’s proprietary claim or a different claim based on unjust enrichment. This is because, in this case, Millett LJ referred to subrogation being the remedy to ‘deprive [the vendor] ... of the unjust enrichment’.¹¹⁶ However, elsewhere in the judgment, Millett LJ found that B was entitled to subrogation in response to B’s claim based on equitable title to the trust funds.¹¹⁷

It is beyond the scope of this thesis to resolve the question as to the scope and availability of subrogation.¹¹⁸ The point is that to the extent that the case law indicates that subrogation is one of a range of remedies available in response to the beneficiary’s proprietary claim,¹¹⁹ this does not alter the pattern according to which the beneficiary’s equity is for relief so that it is as if there had been a

¹¹⁴ For example, orders requiring transfer of specific property might be advantageous in a *rising* market, and a lien preferable in a *falling* market.

¹¹⁵ *Boscawen v Bajwa* [1996] 1 WLR 328, 334–35.

¹¹⁶ *Boscawen* (n115) 334–35.

¹¹⁷ *Boscawen* (n115) 334–35, see also 332.

¹¹⁸ About which see generally: C Mitchell and S Watterson, *Subrogation: Law and Practice* (OUP 2007); Mitchell, Mitchell and Watterson (n112) [39-17]–[39-19]; S Watterson, ‘Modelling Subrogation as an “Equitable Remedy”’ (2016) CJCL 609.

¹¹⁹ See also: *Menelaou v Bank of Cyprus plc* [2016] AC 176 [137]–[140] (Lord Carnwath JSC), [135]–[139] (Lord Neuberger PSC was ‘inclined substantially to agree’ with Lord Carnwath’s judgment).

disability-immunity relationship imposed by non-satisfaction of equity’s standards. Consistent with the pattern as to the effect of relief observed so far, the effect of subrogation in *Boscawen v Bajwa* was to place B the position as if the non-compliant execution had not occurred. Prior to the exercise of power, T held the funds to which B would have had an absolute beneficial interest. The orders for relief required repayment to B, secured against the property, which effectively was as close a position as possible to that B would have been in had T not dealt with the subject property. Finally, the availability of subrogation itself does not tend towards the characterisation of the claim as being in unjust enrichment. Subrogation is not unique to unjust enrichment, and ‘like other equitable doctrines, is applicable to a variety of circumstances’.¹²⁰

4. Other forms of relief, rescission, injunction and declaration

So far, the remedial response has required X to transfer specific property or the value of that property. As foreshadowed at the beginning of this Part, there are other forms of relief in response to the beneficiary’s proprietary claim, for example injunctive or declaratory relief. For the reasons discussed next, the overall pattern as to the effect of response and the extent of B’s equity remains the same. The variations can be accounted for on the basis that equity fashions its response to fit the facts of the case. The facts of some cases require a different form of relief to satisfy B’s equity so that she is placed in the same position, or near enough, as if the non-compliant execution had not occurred.

There are three factual patterns in the cases which present similar reasons why some other form of remedy is required other than orders requiring X to return specific property or repay its value. Each is discussed in turn.

The *first* is that in some cases X does not actually acquire title to property capable of being subject to orders for specific relief because B commences proceedings at a particular point in time preventing completion of the impugned transaction. An example is *Palmer v Monk*, where a trustee entered into a contract for sale of trust property to X contrary to the trust mandate.¹²¹ The trustee had executed the forms necessary to permit X’s registration as the owner of the property; however; B

¹²⁰ *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 [90], see also [91]–[93] (the Court).

¹²¹ *Palmer* (n13) 790.

commenced proceedings prior to registration. X thus had no legal title capable of being subject to specific relief. It was not possible to say that X even acquired an equitable interest under the contract for sale as that contract would not have been amenable to specific performance.¹²²

In this case, Jacobs J granted an injunction restraining the registration of the transfer, and preventing X taking possession of the property. Further, the contract for sale was declared as void and set aside.¹²³ The effect of relief in this case conforms to the same overall pattern of B being placed in the same or near enough position as if the non-compliant execution had not occurred, and this is expressly recognised by Jacobs J who described the extent of B’s equity in the following terms:

The court of equity does not penalize [X] ... It merely requires [X] ... do equity, and equity, as I understand it, involves a restitution so that the beneficiary is in the same position as he or she would have been if the transaction had not been effected or sought to be effected.¹²⁴

The *second* group of cases concerns the situation where X claims a new equitable interest in trust property as a result of an exercise of power that does not comply with the terms of the mandate. As in the first category, X does not acquire T’s title to the subject property, which could be subject to orders for specific relief. In this instance, the relief necessary to place B in the position as if the non-compliant execution had not occurred is declaratory relief to the effect that X does not have an equitable interest enforceable against B or T in relation to trust property.¹²⁵ Depending on the facts, further consequential orders might also be required.

For example, in *Powell v London & Provincial Bank*, T had purported to grant a legal mortgage to X over the trust property (company stock) by delivering a deed of transfer. T had not complied with the requirements to convey legal title to X,¹²⁶ and X did not have legal title to reconvey to a (replacement) trustee. Nonetheless, X did

¹²² *Dance v Goldingham* (1873) LR 8 Ch App 902; *George v McDonald* (1992) 5 BPR 97,391 (NSWSC) (Waddell CJ in Eq).

¹²³ *Palmer* (n13) 790.

¹²⁴ *Palmer* (n13) 790 (emphasis added).

¹²⁵ X may still have enforceable personal obligations against T.

¹²⁶ *Powell v London & Provincial Bank* [1893] 1 Ch 610, 617, affd on appeal [1893] 2 Ch 555, 560–61.

have the deed of transfer and was required to return that deed of transfer and concur in all things necessary to permit the replacement trustee to acquire registered title. Again, the effect of the orders conforms to the overall pattern as being that necessary so that it is as if the non-compliant exercise of power had not occurred, or, in Hohfeldian terms, as if T had been disabled by non-compliance, and B’s interest against T was immune from the non-compliant exercise.

A *third* pattern can be seen in cases concerning the non-compliant exercise of powers created under the express trust. This third category is important to completing this thesis’ account of the response to the beneficiary’s proprietary claim. So far, this Part D has largely concerned cases where T exercised her powers held incident of title to the trust property. The significance is that, as discussed above in Chapter 3¹²⁷ and Part C.3, these powers are not confined in their scope by equity’s standards. A non-compliant execution does not disable T or prevent T from conferring some title upon X, and B’s interest is not immune from non-compliant exercise. Thus, equity’s response in these cases does, usually,¹²⁸ involve requiring X to return specific property or its value to give effect to B’s equity and place her in the position as if her interest had been immune.

The key difference in the third group of cases is that they concern different powers which necessitate different forms of relief to give effect to B’s equity. The powers in these cases are the donee’s powers that are created by the express trust. As explained above in Part C.3 and Chapter 3,¹²⁹ these powers are actually disabled by non-compliance with equity’s standards. There is no exercise of power effective to change B’s interest or create a new interest in X’s favour. B’s interest is immune from non-compliant exercise of these powers.

The immediate significance is that X has not acquired any title from T which X can be ordered to return or pay the value of. This does not mean that B has no equity for relief. Her equity is for the relief necessary to give effect to the donee’s disability and B’s correlative immunity from exercise. This includes declaratory relief to the effect that the exercise of power is invalid, and/or orders setting aside the

¹²⁷ Chapter 3, Part E.1.ii.a.

¹²⁸ Unless, as in *Palmer* (n13), B commences proceedings prior to X actually acquiring title.

¹²⁹ Chapter 3, Part E.1.ii.b.

purported appointments. For example, in *Cloutte v Storey*, and other cases,¹³⁰ the fraudulent appointments were declared void¹³¹ and unenforceable against B, and orders were made setting aside the purported appointments. There are other cases where orders have been made setting aside the purported exercise of power and requiring deeds of appointment to be delivered up.¹³²

5. Beneficiary’s proprietary claim as a defence

The final variant in equity’s response is where B raises the claim as a defence¹³³ to the plaintiff’s claim against B or T. For example, in *Shropshire Union v R*, the plaintiff’s motion for mandamus to compel registration of ownership of shares in the plaintiff’s favour was defeated in favour of B, who asserted her priority of equitable title under an express trust.¹³⁴ The plaintiff’s claim was on the basis that the plaintiff took security over the shares under an equitable mortgage granted by T. This exercise of power was non-compliant because it was not permitted by the terms of the trust mandate. B asserted her priority of equitable title and the plaintiff’s motion was dismissed. No formal remedy was granted in this case. However, it still forms part of the overall pattern of response to the beneficiary’s proprietary claim. The dismissal of the plaintiff’s case had the effect of leaving B in the position as if the non-compliant execution had not occurred.

There are further cases where a plaintiff’s claim in respect of trust property is defeated, and where the plaintiff’s claim is based on her having an interest that depends upon a non-compliant exercise of power, whether it be a failure to comply with the terms of the trust mandate,¹³⁵ the proper purposes standard,¹³⁶ or the bona fides standard.¹³⁷ In all these cases, the priority between the plaintiff and B is

¹³⁰ See eg: *Lane* (n35); *Aleyn* (n35); *Re Crawshay* (n35), affd on appeal [1948] Ch 123, 144; *Dick v Dick* [1953] Ch 343; *Re Simpson* (n35); *Pryor* (n35); *Farmer* (n35).

¹³¹ *Cloutte* (n32) 36–37.

¹³² See, eg: *Wellesley* (n35). In *Cloutte* (n32) 36–37, Farwell LJ did not order the deed to be delivered up and cancelled as that would ‘embarrass the [equitable assignees] in suing on the covenants in their purchase deeds’ as against the appointee.

¹³³ As to the distinctions between defences and denials, see Chapter 8.

¹³⁴ *Shropshire Union* (n51).

¹³⁵ *Stroughill* (n16); *Perham* (n13); *Cory* (n51). See also: *Kelly v Toohey* (1900) 21 LR (NSW) Eq 33, 38–40, affd on appeal (1900) 21 LR (NSW) Eq 40, 43–45, 47–48.

¹³⁶ *Daubeney* (n35); *Re Marsden’s Trust* (n35).

¹³⁷ *Dowager Duchess of Sutherland* (n37).

decided according to what is necessary to leave B in the position as if the non-compliant exercise had not occurred.

E. Conclusion

This Chapter has undertaken a task essential to this thesis’ aim, which is to demonstrate that the event relevant to the claim is the event of non-compliant execution. The arguments in this Chapter are made on the basis that they represent the best interpretation of the cases. Chapter 5 will continue demonstrating the relative merit of this interpretation over others that understand the claim as being conditioned upon trustee wrongdoing. Chapter 5 will show that the beneficiary’s proprietary claim is not available when equity’s standards are complied with, and that the claim’s availability is not conditioned upon a breach of fiduciary or other duty by the trustee.

This Chapter has also confronted the (incorrect) assumptions as to the limited range of remedial responses to the beneficiary’s proprietary claim. Part D has demonstrated that there is a range of specific forms of remedial relief available in response to the claim. Orders for the transfer of title to specific property is not the only response. This Chapter has further argued that, despite these variations, there is unifying pattern as to the nature and extent B’s equity for relief, which is for relief *that is necessary to place B in the position, or near enough, as if the non-compliant exercise of power had not occurred.*

Finally, this Chapter has used the concept of a disability-immunity relationship to describe the overall effect of remedial relief in more precise terms. Specifically, B’s equity is for relief necessary either: (i) to give effect to the disability-immunity relationship concerning powers created under the express trust; or (ii) to place B in the position, or near enough, as if her interest were immune from the non-compliant exercise of power and as if T’s exercise had been disabled in relation to the non-compliant exercise by T of powers held subject to an express trust. The significance is to accurately describe the extent of B’s equity for relief as recognised by the beneficiary’s proprietary claim; this will be important to the analysis of X’s responsibility in Chapter 6.

Chapter 5 – The beneficiary’s proprietary claim does not respond to wrongdoing

A. Introduction

Chapter 4 argued that the beneficiary’s proprietary claim is triggered by an exercise of power where that exercise fails to satisfy equity’s standards, referred to as a non-compliant execution. These standards, which require compliance with the trust mandate, fidelity to the donor’s purpose and bona fides, are not the only controls on the exercise of power held subject to an express trust. As discussed in Chapter 3,¹ there are a range of mechanisms that apply to control the exercise of powers held subject to an express trust. A trustee (‘T’), and sometimes, a donee (‘D’), will owe duties with respect to the exercise of their powers, including a duty to consider, a duty of care and fiduciary duties. The significance of these other duties is that there is some support in the cases and academic commentaries² for the view that the beneficiary’s proprietary claim is triggered by wrongdoing, specifically a breach of duty by T or D. It is thus necessary for this thesis to disaggregate the beneficiary’s proprietary claim from these other controls. In particular, it is necessary to show that a breach of duty by T, or D, is not an event relevant to the beneficiary’s property claim. That is the aim of this Chapter.

The analysis in this Chapter relies upon the distinction between a breach of a duty, which is identified as the event of wrongdoing, and an exercise of power that fails to meet equity’s standards, identified as a non-compliant execution. This distinction has been drawn in the cases³ and was discussed in more detail in Chapter 3. A particular challenge for the analysis in this Chapter is that, in the context of the express trust, it is not always easy to disaggregate wrongdoing from a non-compliant execution. Facts that reveal a non-compliant execution of power

¹ Chapter 3, Part B.

² See eg: *Foskett v McKeown* [2001] 1 AC 102, 116–17 (Lord Hope), 126–27, 130 (Lord Millett); *Akers v Samba Financial Group* [2017] AC 424 [46], [51]; L Tucker, N Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) [41-010]–[41-014]; D Salmonds, ‘Claims against Third-Party Recipients of Trust Property’ (2017) 76 CLJ 399, 407–08.

³ See eg: *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 [254] (the Court); *Pitt v Holt* [2013] 2 AC 108 [43], [60], [93] (Lord Walker); *Pitt v Holt* [2012] Ch 132 [99] (Lloyd LJ).

may also reveal wrongdoing by a trustee. The approach taken in this Chapter is to show that: (i) the beneficiary’s proprietary claim *is available* where there is *no breach* of duty; and (ii) the claim is *not* available where equity’s standards are satisfied, despite there being a breach of duty by T or D. If these propositions are accepted, it is submitted that it follows that a breach of duty is not the event relevant to the beneficiary’s proprietary claim. This is despite the potential for one set of facts to give rise to events of both non-compliant execution and wrongdoing.

A further challenge for the arguments in this Chapter is the relationship between the beneficiary’s proprietary claim and breach of fiduciary obligations. T is an archetypal fiduciary.⁴ Thus, to show that the beneficiary’s proprietary claim is a response to non-compliant execution, rather than breach of duty, the claim needs to be disaggregated from breach of fiduciary duty in particular. It will be seen that there are a range of proprietary claims available in response to a breach of fiduciary duty, but that the beneficiary’s proprietary claim is not one of them.

The analysis in this Chapter will proceed as follows. Part B will demonstrate proposition (i), that the beneficiary’s proprietary claim *is available* where there is *no breach* of duty. Part C will demonstrate proposition (ii), that the claim is *not* available where equity’s standards are satisfied, despite there being a breach of duty by T or D, including breach of fiduciary duties.

B. The claim is available even where there is no trustee wrongdoing

Considered in this Part B are the cases that demonstrate that the beneficiary’s proprietary claim is available even where there is no breach of duty by T or D. These cases can be grouped into two categories: (1) a non-compliant exercise of power by D; and (2) a non-compliant exercise of power by T. Each category will be discussed in turn.

⁴ *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 68 (Gibbs CJ), see also 96–97 (Mason J); *Breen v Williams* (1996) 186 CLR 71, 92 (Dawson and Toohey JJ), 107 (Gaudron and McHugh JJ), 137 (Gummow J); *Keech v Sandford* (1762) Sel Cas Ch 61.

1. A non-compliant exercise of power by D

Most persuasive is the family of cases⁵ where there is a non-compliant exercise of power by D who is not also a trustee. Further, D in these cases does not owe fiduciary, or other, duties with respect to the exercise of power, and yet D’s execution gives rise to the beneficiary’s proprietary claim. ‘Duty must precede breach’;⁶ thus, the significance of these cases is that they clearly disaggregate the beneficiary’s proprietary claim from breach of duty. Consider, for example, *Cloutte v Storey*,⁷ where D exercised a power of appointment in a manner that failed to meet equity’s standards; specifically, there was fraud on the power. B was able to rely upon the beneficiary’s proprietary claim and assert priority over the later equitable assignees from the appointee. *There was no breach of duty by D or T in this case.* Nonetheless, the beneficiary’s proprietary claim was available.

As discussed in Chapter 3,⁸ an express trust can create powers held by D who does not owe duties of trusteeship, or fiduciary duties. The donees in *Cloutte v Storey* were not trustees; nor did they owe fiduciary, or any other, duties with respect to the exercise of their power. T had not exercised any power in response to the fraudulent appointments, such as transferring title to the appointed property, and had not otherwise done anything capable of amounting to a breach of duty. The beneficiary’s proprietary claim was available in *Cloutte* without there being any breach of duty by T or D.

This pattern is repeated in other cases⁹ where there is a non-compliant execution by D who does not owe fiduciary, or other duties, with respect to the exercise of power. The significance of these cases cannot be overstated. They show that the beneficiary’s proprietary claim is available despite there being no breach of duty,

⁵ *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84; *Daubeny v Cockburn* (1816) 1 Mer 626; *Wellesley v Earl of Mornington* (1855) 2 K & J 143; *Re Marsden’s Trust* (1859) 4 Drew 594; *Duke of Portland v Topham* (1864) 11 HL Cas 32, 60, discussed below at text accompanying nn12–14; *Pryor v Pryor* (1864) 2 De GJ & S 205. See also: *Gilbert v Stanton* (1905) 2 CLR 447 where B’s claim was not made out, there being no fraud on a power; however, the issue of breach of duty by T or D was not mentioned in the judgment as relevant to B’s claim.

⁶ *Breen* (n4) 109 (Gaudron and McHugh JJ).

⁷ *Cloutte v Storey* [1911] 1 Ch 18.

⁸ Chapter 3, Parts D.2.ii–iii.

⁹ See n5.

thus supporting this Chapter’s main argument that the claim is not a response to wrongdoing.

2. A non-compliant exercise of power by T

Where T acts upon a non-compliant exercise of a power by D, for example by transferring title to trust property to the appointee, the question arises whether the trustee is in breach of her duties. If so, the availability of the beneficiary’s proprietary claim might be ascribed to T’s breach, rather than D’s non-compliant exercise. Thus, it is important to explain that in the scenario where there is a breach of duty by T, the beneficiary’s proprietary claim is available in response to the non-compliant execution.

As explained in Chapter 3, D’s improper purpose confines the scope of, and actually disables the exercise of, the power of appointment. This means that a non-compliant execution is not effective to vary the trust terms, and the purported appointee has no entitlement under the trust. The consequence is that if T transfers title to trust property to the purported appointee,¹⁰ this exercise of power is outside the (unvaried) terms of trust. T’s transfer is a non-compliant exercise of power *and* a breach of the trustee’s duty to adhere to the trust terms.¹¹ The beneficiary’s proprietary claim is available in response to the non-compliant execution, *not* the trustee’s breach of duty.

Consider, for example, *Duke of Portland v Topham*, where T acted on the improper exercises of powers, some held by T, and some by D, by paying trust funds to the purported appointees.¹² For the reasons just mentioned, there would have been a

¹⁰ See eg: *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862; *Roadchef (Employee Benefits Trustees Ltd) v Hill* [2014] EWHC 109; *Wong v Burt* [2004] NZCA 174.

¹¹ For which T may be personally liable. However, T may be exempted from liability, see eg: Trustee Act 1925 (NSW) s 85, where T has ‘acted honestly and reasonably, and ought fairly to be excused for the breach of trust’. Cases indicate that where there is a fraudulent appointment by D, it is necessary for T to show that she did not have the requisite degree of knowledge of the donee’s subjective purpose; *Harrison v Randall* (1852) 9 Hare 397, 407; *Mackechnie v Marjoribanks* (1870) 39 LJ Ch 604; *Re Deane* (1889) 42 Ch D 9, 18; G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens & Sons 1916) 471; *Lewin on Trusts* (n2) [29-316]; D Hayton, P Matthews and C Mitchell, *Underhill & Hayton: The Law of Trusts* (19th edn, LexisNexis 2016) [57.63].

¹² *Duke of Portland* (n5).

breach of duty by T in transferring the funds to the appointees. However, the availability of B’s claim was expressly conditioned upon the improper exercises of the power of appointment by T and D.¹³ A breach of duty by T is not mentioned in the reasoning in the case. Further, observe that some of the non-compliant executions were by D who, like D in *Cloutte v Storey*, did not owe or breach any duty. Consistent with the argument made here, Lord Westbury LC in *Duke of Portland* stated that it was ‘impossible’ to distinguish between the executions by T and D, and B’s claim was treated the same in relation to both.¹⁴ This further supports this Chapter’s argument that non-compliant execution, not breach of duty, is the trigger for the beneficiary’s proprietary claim.

It is, however, difficult to further disaggregate the events of non-compliant execution and trustee wrongdoing where there is an exercise of power *by T* (as opposed to D) that fails to comply with the terms of the trust mandate or the bona fides standard. This is because, in such circumstances, there will also be a breach either of T’s duty to adhere to the trust terms or T’s duty to act in good faith.¹⁵ Thus, it is not possible to point to cases where non-compliance *by T* is not also a breach of duty. This observation further highlights the importance of the cases concerning non-compliant execution by D, as they clearly disaggregate the beneficiary’s proprietary claim from breach by T. However, it is possible to further isolate non-compliant execution over breach of duty as the event relevant to the beneficiary’s proprietary claim by considering those cases that show that the claim is not available when equity’s standards are satisfied, even where there is a breach of duty by T. This is the aim of Part C next.

C. The claim is not available where equity’s standards are satisfied, despite trustee wrongdoing

This Part C demonstrates the second proposition upon which this Chapter’s argument rests, that the beneficiary’s proprietary claim is *not* available where equity’s standards are satisfied, despite there being a breach of duty by T or D. The further significance of the analysis in this Part C is to advance this Chapter’s

¹³ *Duke of Portland* (n5).

¹⁴ *Duke of Portland* (n5) 60.

¹⁵ See Chapter 3, Part E.1.i.

isolation of a non-compliant execution as the event relevant to the beneficiary’s proprietary claim, rather than wrongdoing.

The cases demonstrate this second proposition in three ways. *First*, there are cases which provide limited express support for the view that the beneficiary’s proprietary claim is not available when equity’s standards are met. *Second*, there are cases which show that the claim is not available in relation to T or D’s breach of particular duties, such as adequacy of consideration, duty of care, and fiduciary duty. *Third*, there are cases which demonstrate that other proprietary claims are available, in response to the breach of T’s duties, which are distinct from the beneficiary’s proprietary claim. These three patterns are discussed in more detail in Parts C.1–3, respectively.

1. Claim is not available if equity’s standards are met

An example of a case that provides some express support for the view that the beneficiary’s proprietary claim is *not* available when equity’s standards are met, is *Space Investments Ltd v CIBC Trust Co (Bahamas) Ltd*.¹⁶ Lord Templeman indicated that if T’s application of trust funds was *not* permitted by the trust terms, then B would have ‘the equitable remedy of tracing the trust money to any property into which it has been converted directly or indirectly’.¹⁷ Lord Templeman went on to state that the beneficiary’s proprietary claim was not available on the facts of that case because T had acted ‘pursuant to the authority ... conferred by the settlement’.¹⁸ There are further cases which expressly recognise that the claim is not available where there is an exercise of power in relation to trust property that complies with equity’s standards. For example, the English Court of Appeal in *Pitt v Holt* explained:

The interest of a beneficiary in the trust property continues until it is brought to an end *by an act of the trustees done in accordance with the terms of the trust (or general law)*.¹⁹

¹⁶ *Space Investments Ltd v CIBC Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (the Board).

¹⁷ *Space Investments* (n16) 1074–75.

¹⁸ *Space Investments* (n16) 1074–76.

¹⁹ *Pitt v Holt* [2012] Ch 132 [99] (Lloyd LJ; Longmore and Mummery LJ agreeing), not questioned on appeal [2013] 2 AC 108.

There are other statements²⁰ that express the availability of the claim at a higher level of generality, in terms of ‘authority’. For example, in *Stroughill v Anstey*, Lord St Leonards LC began his reasons for awarding relief in favour of B against X (a subsequent mortgagee of trust property) with: ‘[t]he first question is, whether a mortgage was or was not authorised by the trusts’.²¹ A breach of duty by T was not identified as relevant to B’s claim. However, less weight can be afforded to these cases given the ambiguity associated with ‘authority’. It is not clear what principles or standards inform the assessment of whether an exercise of power is or is not authorised. It is submitted that a breach of duty does *not* inform authority on the basis that authority is employed to assess the exercise of power when it is held by T who does owe duties, and D when she does not owe any duties.²² Thus, the use of this concept, at least at a higher level of generality, lends some support to this thesis’ argument that the beneficiary’s proprietary claim is not triggered by breach of duty.

There is one further case worth particular mention as it is relied upon as supporting the contrary argument that T’s wrongdoing is the event triggering the beneficiary’s proprietary claim. Dr Salmonds, for example, has argued that the beneficiary’s proprietary claim is a response to T’s breach of the duty to preserve trust property.²³ One case is cited in support: *A-G v Earl of Chesterfield*.²⁴ The reasoning in this case, however, does not expressly condition the beneficiary’s proprietary claim upon trustee wrongdoing.

A-G v Earl of Chesterfield was a demurrer on an information filed by the Attorney-General seeking to join a trustee’s agent in a claim to recover property held subject

²⁰ See eg: *Devaynes v Robinson* (1856) 24 Beav 86, 96 (Sir John Romilly MR); *Perham v Kempster* [1907] 1 Ch 373, 380 (Joyce J); *Lewin on Trusts* (n2) [41-013], [42-047].

²¹ *Stroughill v Anstey* (1852) 1 De GM & G 635, 642.

²² See eg: *Topham v Duke of Portland* (1863) 1 De GJ & S 517, 568–69 (Lord Knight Bruce) where ‘unauthorised’ was used in relation to an improper exercise of power; *Re Salmon* (1889) 42 Ch D 351, 366, 370 (Fry LJ), where that term was used in relation to an exercise of power that failed to comply with the trust terms.

²³ Salmonds (n2) 407–08.

²⁴ *A-G v Earl of Chesterfield* (1854) 18 Beav 596, 599–600 (Sir John Romilly MR).

to a charitable trust.²⁵ Sir John Romilly MR held that the agent was not a proper defendant.²⁶ The trustee’s transfer of trust funds to the agent was ‘authorized’²⁷ and thus it was not possible to claim against the agent. Consistent with this thesis’ arguments, the beneficiary’s proprietary claim (asserted by the Attorney-General in this case) depended on whether T’s transfer of trust property to the agent was ‘authorized’ by the trust mandate, and not a breach of duty by the trustee.

2. Breach of particular duties

Part C.1 above set out the cases which lend some express support to the argument that the beneficiary’s proprietary claim is *not* available where equity’s standards are satisfied. To strengthen this argument, this Part C.2 will demonstrate the *unavailability* of the claim where there is: (i) a breach of a particular duty by T, or D; and (ii) equity’s standards are otherwise satisfied. Space does not allow this undertaking to be conducted across all trustee duties, and the following analysis will demonstrate the unavailability of the claim despite breach of particular trustee duties, being: (i) a duty to consider; (ii) a duty of care; and (iii) fiduciary obligations.

i. Duty to consider

Considered here are the cases relevant to the relationship between the beneficiary’s proprietary claim and T’s duty to properly inform herself in relation to, and give adequate consideration to the exercise of a power.²⁸ This duty has been identified in different ways; for example, in England it has been referred to as the ‘rule in *Re Hastings-Bass*’.²⁹ Generally speaking, this duty requires certain matters to be considered, and other matters to be disregarded,³⁰ and sometimes particular

²⁵ The application of the beneficiary’s proprietary claim to charitable trusts is discussed further in Chapter 7.

²⁶ A-G (n24) 599–600.

²⁷ A-G (n24) 599.

²⁸ *Cock v Smith* (1909) 9 CLR 773, 798 (Griffiths CJ); *Karger v Paul* [1984] VR 161, 164, 166 (McGarvie J); *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 [57]–[66] (the Court); *Pitt v Holt* [2013] 2 AC 108 [40]–[41], [70]–[73] (Lord Walker).

²⁹ *Re Hastings-Bass* [1975] Ch 25. A label which was criticised by Lord Walker as a ‘misnomer’ in *Pitt v Holt* [2013] 2 AC 108 [1] and one that should be called the ‘rule in *Mettoy*’. See generally: M Ashdown, *Trustee Decision Making: The Rule in Re Hastings-Bass* (OUP 2015).

³⁰ Such as taxation consequences, see eg: *Pitt v Holt* [2013] 2 AC 108 [95].

inquiries to be made.³¹ The level of consideration is calibrated to the nature and circumstances of the particular trust.³² There is some uncertainty as to the relationship between this duty and fiduciary loyalty,³³ although this does not need to be resolved in this thesis because, according to the position taken in this thesis, the beneficiary’s proprietary claim is associated with neither phenomenon.

This thesis’ position is that the beneficiary’s proprietary claim is not available in response to inadequate consideration because there is: (a) a key difference in the proprietary response recognised by the beneficiary’s proprietary claim, as compared with that in response to inadequate consideration; and (b) a distinction between the bona fides standard and inadequate consideration. These reasons are discussed in more detail now.

*a. Proprietary claim in response to inadequate consideration
distinguished from B’s claim*

The specific claim identified in this thesis as the beneficiary’s proprietary claim is not available in response to breach of a duty to consider, having regard to some key operational distinctions between the response to inadequate consideration and the response to the beneficiary’s proprietary claim. To demonstrate this point, it is necessary to first set out what is the response to inadequate consideration.

Pitt v Holt makes clear that breach of the duty to consider renders the exercise of power voidable and not void.³⁴ Pausing here, this thesis has already explained the

³¹ As in *Finch* (n28) [51]–[56] (the Court).

³² *Finch* (n28) [66] (the Court).

³³ The label ‘fiduciary’ was used to describe the duty to consider in *Pitt v Holt* [2013] 2 AC 108 [1], [41], [71]–[73], [79]–[80], [96], [97]. However, other cases confine fiduciary duties to duties to avoid conflict and profit, see eg: *Breen* (n4) 113 (Gaudron and McHugh JJ), 135 (Gummow J); *Howard v Comr Taxation* (2014) 253 CLR 83 [59] (Hayne and Crennan JJ); *Bristol & West Building Society v Mothew* [1998] Ch 1, 18–19 (Millet LJ). This issue is contested and intersects with another debate about the content of fiduciary loyalty, including whether the duty of care and skill is fiduciary in character, see eg: J Getzler, ‘Duty of Care’ in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 41; J Edelman, ‘*Nocton v Lord Ashburton* (1914)’ in C Mitchell and P Mitchell (eds), *Land Mark Cases in Equity* (Hart Publishing 2012) 497; D Heydon, ‘Modern Fiduciary Liability: The Sick Man of Equity?’ (2014) 20 T&T 1006; L Smith, ‘Prescriptive Fiduciary Duties’ (2018) 37 QULJ 261, 280.

³⁴ *Pitt v Holt* [2013] 2 AC 108 [43], [93]–[94] (Lord Walker).

problems caused by relying on the labels of ‘void’ and ‘voidable’ to understand the effect of certain legal principles.³⁵ However, these terms have been used in the cases to distinguish between the scenario where the beneficiary’s proprietary claim is available, in cases of voidness, and where it is not available, in cases of voidability. Thus, the cases’ use of these terms *does* assist in demonstrating that the beneficiary’s proprietary claim is not triggered by inadequate deliberation.

The voidability preference in *Pitt v Holt*, for example, tends inexorably to the view that breach of this duty has no relationship with the beneficiary’s proprietary claim. Voidable in this context means that ‘if there is no attempt ... to avoid the transaction, it remains valid and effective as regards all concerned’.³⁶ B has a mere equity for rescission,³⁷ which is a power to request equitable relief to revest equitable title in B’s favour. Importantly for the analysis here, until this power is exercised, and consequential relief is granted, B has no equitable interest in the property.³⁸

On the voidability approach, B may have a proprietary claim when there is a breach of the duty to consider. It is clear that this proprietary claim is distinct from the phenomenon of concern to this thesis. According to *Pitt v Holt*, inadequate consideration generates a mere equity in B’s favour, which *might* ultimately produce the same result as the beneficiary’s proprietary claim: return of property back into trust. Nonetheless these phenomena are distinct. This is best seen from the perspective of priorities. A mere equity, like that for rescission of a transfer on the basis of breach of the duty to consider, will be postponed in favour of a later legal *or equitable* titleholder who acquires title in good faith and for

³⁵ Chapter 4, Part C.3.ii.

³⁶ *Pitt v Holt* [2012] Ch 132 [100] (Lloyd LJ), not questioned on appeal [2013] 2 AC 108.

³⁷ P Birks, ‘Rights, Wrongs and Remedies’ (2000) 20 OJLS 1, 32; S Worthington, ‘The Proprietary Consequences of Rescission’ [2002] 10 RLR 28; B Häcker, ‘Proprietary Restitution after Impaired Consent Transfers’ (2009) 68 CLJ 324, 351; B Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Hart Publishing 2013).

³⁸ *Shalson v Russo* [2005] Ch 281 [120]–[127]; D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) [1.57]–[1.69], [16.17]; P Millett, ‘Restitution and Constructive Trusts’ (1998) 114 LQR 399, 416.

consideration.³⁹ By contrast, the beneficiary’s proprietary claim asserts an equitable interest that, *prima facie*, will rank in priority over the good faith purchaser of later equitable title. The fact that breach of the duty to consider results in voidability and a mere equity demonstrates that the beneficiary’s proprietary claim, and any equitable interest it asserts, is *not* available *in response to* breach of the duty to consider.

It must be acknowledged that there are Australian and English cases decided before *Pitt v Holt* that present different patterns. In particular there are some cases favouring voidness as the effect of breach of the duty to consider. These cases could be understood to suggest that the beneficiary’s proprietary claim *is* available where there is a breach of the duty to consider. The rest of the discussion in this Part C.2.i.a will explain why these cases should not be understood in this way.

Cases favouring the voidness approach must now be read in light of *Pitt v Holt*, which criticised that approach. *Sinclair v Moss*, for example, adopted the voidness approach, where Byrne J found that T’s inadequacy of consideration rendered an appointment *void* and B was able to recover the appointed funds.⁴⁰ Byrne J’s decision as to voidness was based on *Turner v Turner*⁴¹ and *Seiff v Fox*.⁴² These two cases, and *Sinclair v Moss*, were however all decided prior to *Pitt v Holt*. Further, *Turner v Turner* has since been understood as an example of where there was no conscious exercise of any discretion at all.⁴³ Thus, the proprietary claim in *Turner v Turner* responded to the non-compliant execution, not breach of the duty of consideration, as explained in Chapter 4.⁴⁴

Turning to *Sinclair v Moss* itself, and having regard to the facts in this case, an argument can be made that the trustee’s dealing with trust property was contrary

³⁹ *Rice v Rice* (1853) 2 Drew 73, 78; *Phillips v Phillips* (1861) 4 De G F & J 208, 218; *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, 277–79 (Kitto J), 291 (Menzies J).

⁴⁰ *Sinclair v Moss* [2006] VSC 130 [78], [84], [91].

⁴¹ *Sinclair* (n40) [79]–[84]; *Turner v Turner* [1984] Ch 100.

⁴² *Sieff v Fox* [2005] EWHC 1312 [80]–[82].

⁴³ In *Pitt v Holt* [2013] 2 AC 108 [43], [67] *Turner* (n41) is described as a case where T was not aware of the existence of any power.

⁴⁴ Chapter 4, Part C.1.iii.

to the terms of the trust mandate. T’s consideration of certain matters was a pre-condition to the existence of the power according to the trust terms. Byrne J found that the trustees failed to have regard to these two matters before purportedly exercising the power of appointment.⁴⁵ Having regard to the trust terms, and circumstances of its exercise, *Sinclair v Moss* should be understood as demonstrating the availability of the beneficiary’s proprietary claim where there is a non-compliant execution, not breach of a duty of consideration.

b. Distinction between inadequate consideration and the bona fides standard

Finally, it is important to distinguish the duty to consider from one of equity’s standards, that referred to in this thesis as the bona fides standard. As mentioned in Chapter 3,⁴⁶ the two doctrines have some conceptual concurrency as they both require consideration on the part of T/D. Facts may evidence a breach of the duty to consider *and* non-compliance with the bona fides standard, although they are not coextensive. For example, if T exercises a power of appointment in the subjective belief that the appointment is in the best interests of the appointee, she might yet fail to consider (and obtain advice on) the taxation consequences of the appointment. On this hypothetical, the execution satisfies equity’s standards, including the bona fides standard. There is, however, a breach of the trustee’s duty to give adequate consideration to the relevant circumstances, one of which is the taxation consequences.⁴⁷

Despite these distinctions, the duty of consideration and the bona fides standard are not always expressly distinguished, as in *Turner v Turner*⁴⁸ and *Sinclair v Moss*.⁴⁹ However, the facts of these cases also revealed an exercise of power that failed to comply with equity’s standards, being the bona fides standard in *Turner v Turner* and compliance with the trust terms in *Sinclair v Moss*. It is submitted that these cases do not support the view that the beneficiary’s proprietary claim is available

⁴⁵ *Sinclair* (n40) [78] (‘the trustees ... failed to take account of two matters which by the will they were obliged to have taken into account’).

⁴⁶ Chapter 3, Part E.1.i.c and Part E.3.i.

⁴⁷ See n30.

⁴⁸ *Turner* (n41).

⁴⁹ *Sinclair* (n40).

in response to breach of the duty to consider. They should instead be understood as cases where the claim is available in response to a non-compliant exercise of power.

ii. Duty of care

This Part C.2.ii demonstrates that the beneficiary’s proprietary claim is *not* available in response to a breach by T of her duty of care.⁵⁰ A similar conclusion has been reached in academic commentaries,⁵¹ albeit little case authority has been cited in support. I have not been able to find a case that directly considers this issue and expressly states that the claim is not available in response to a breach of duty of care. This thesis’ argument is thus made on the basis of: (a) two cases which lend some support to my argument; and (b) a lack of cases suggesting that the beneficiary’s proprietary claim is available in response only to a breach of the trustee’s duty of care and skill. Each basis is discussed in turn.

a. Cases indicating that the beneficiary’s proprietary claim is not available in response to breach of a duty of care

The first case is *Re Salmon*,⁵² which is relevant because the English Court of Appeal considered the effect of a breach of duty of care in relation to T’s investment of trust property. The relevant issue in the case was whether T’s investment (a mortgage) formed part of the trust estate despite T’s negligence. The Court of Appeal held that where T’s dealing with trust property does *not* comply with the trust terms, the substitute property does not form part of the trust estate.⁵³ Significantly for the analysis here, the Court of Appeal found that the investment in this case did comply with the trust terms and thus the substitute property formed part of the trust estate. This was *despite* T’s breach of the duty of care. Cotton LJ

⁵⁰ About which see generally: *Fouche v The Superannuation Fund Board* (1952) 88 CLR 609, 640–45; *Speight v Gaunt* (1883) 22 Ch D 727; *Leahey v Whitely* (1887) 12 App Cas 727; *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2)* [1980] Ch 515.

⁵¹ See eg: McGhee J (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) [10-38], [30-12]; M Conaglen, ‘Remedial Ramifications of Conflicts between a Fiduciary’s Duties’ (2010) 126 LQR 72, 73–76; *Lewin on Trusts* (n2) [41-014], [30-50]; R Nolan, ‘Controlling Fiduciary Power’ (2009) 68 CLJ 293, 294.

⁵² *Re Salmon* (n22).

⁵³ *Re Salmon* (n22) 367–68 (Cotton LJ), 369–71 (Fry LJ).

explained that an investment ‘within the terms of the trust ... is entirely distinct from that of an investment outside the terms of the trust’.⁵⁴ Thus, the trustee’s exercise of power, despite being negligent, *was effective* in the sense that the substitute property formed part of the trust estate, and B had election to deny the transaction and pursue the original property in X’s hands.⁵⁵ In other words, the beneficiary’s proprietary claim was not available in this case as the exercise of power met equity’s standards, and further, a breach of T’s duty of care *alone* was *insufficient* to trigger B’s claim.

The second case is *Fouche v The Superannuation Fund Board*, which considered: (i) the beneficiary’s proprietary claim against X; and (ii) a claim for compensation for loss against T.⁵⁶ What is significant about this case is that a different event was identified as relevant to each claim. The beneficiary’s proprietary claim was available because the corporate trustee, via a former director, lent trust funds in an investment of ‘a kind that it ought never to have been made at all for any amount’.⁵⁷ The claim for compensation for loss, on the other hand, was expressly based on the corporate trustee’s breach, via its former director, of its duty of care.⁵⁸ There was no express statement to the effect that different events underpinned the different claims. Nonetheless, it is submitted that implicit in the separate treatment of these claims is the understanding that the beneficiary’s proprietary claim would not have been available in response to T’s breach of its duty of care.

b. A lack of cases suggesting that the beneficiary’s proprietary claim is available in response to breach of a duty of care

Next, there is a lack of cases where the beneficiary’s proprietary claim is available in response only to a breach of the trustee’s duty of care and skill. This observation is consistent with the argument that the claim is not triggered by a breach of the duty of care, albeit one case came close. *LHK Nominees Pty Ltd v Kenworthy*

⁵⁴ *Re Salmon* (n22) 368, 367 (Cotton LJ; Bowen LJ agreeing), see also 370–71 (Fry LJ; Bowen LJ agreeing).

⁵⁵ *Re Salmon* (n22) 367–68 (Cotton LJ), 371 (Fry LJ).

⁵⁶ *Fouche* (n50).

⁵⁷ *Fouche* (n50) 637 (the Court).

⁵⁸ *Fouche* (n50) 640–43.

concerned a transfer of trust property by T to X for an undervaluation.⁵⁹ T sought recovery of the property from X, and pleaded multiple causes of action, including knowing receipt and unjust enrichment.⁶⁰ The beneficiary’s proprietary claim was not pleaded. However, Murray J, in obiter, indicated that the beneficiary’s proprietary claim may have been available to either T or B in response to T’s failure ‘to exercise that ordinary degree of prudence which ought to have exercised in respect of the property’.⁶¹

It is submitted that these obiter comments are, with respect, wrong. These comments are inconsistent with the finding of Murray J (and Wallwork J⁶²) that the trustee’s ‘transfer *was effective* to convey the legal *and beneficial ownership* in the property to the [recipient]’.⁶³ Further, these comments should not undermine this thesis’s argument because they were made in relation to a claim not pleaded or raised on appeal by the parties⁶⁴ and not necessary to resolution of the case. Further, these comments were not supported or discussed by any of the other three judgments delivered in the case.

Finally, there are two groups of cases that could undermine this thesis’ argument as to the disaggregation of the beneficiary’s proprietary claim and breach of the duty of care, but which, for the following reasons, do not. The *first* group of cases indicate that a court will likely order injunctive relief to prevent completion of a sale where there has been a breach of the trustee’s duty of care and skill.⁶⁵ It is submitted that these cases are not evidence of the beneficiary’s proprietary claim, and do not suggest that the claim is available directly in response to a breach of the

⁵⁹ *LHK Nominees Pty Ltd v Kenworthy* (2002) 26 WAR 517. Special leave to appeal refused [2003] HCATrans 246 (Gleeson CJ and Gummow J).

⁶⁰ The relevant pleadings are substantially reproduced in *LHK Nominees Pty Ltd v Kenworthy* [2001] WASC 205.

⁶¹ *LHK Nominees* (n59) [179]–[182].

⁶² *LHK Nominees* (n59) [53].

⁶³ *LHK Nominees* (n59) [178] (emphasis added).

⁶⁴ *LHK Nominees* (n59) [171]–[183].

⁶⁵ See eg: *Dance v Goldingham* (1873) LR 8 Ch App 902, 911 (James LJ), 913 (Mellish LJ); *George v McDonald* (1992) 5 BPR 97,391 (NSWSC) (Waddell CJ in Eq).

duty of care. These cases evidence a distinct phenomenon: the award of an injunction to restrain a breach of duty by T.

The *second* group of cases indicate that specific performance of a contract will not be awarded where the entry into a contract, or the performance of a contract, results in a breach of duty by T, such as a breach of duty of care.⁶⁶ It is submitted that this reluctance to grant specific performance reflects the discretionary nature of an award of specific performance. In particular, it indicates that ‘an unconscientious trustee [cannot] be entitled to the assistance of the Court in carrying out a contract which is a breach of trust’ and in such a case ought to be left to her remedy at law.⁶⁷ For this reason, it is submitted that these cases are of no further significance, and do not detract from the argument in this Part C.2.ii that the beneficiary’s proprietary claim does not arise in response to a breach of duty of care.

iii. Fiduciary obligations

‘The archetype of a fiduciary is of course the trustee’.⁶⁸ Thus, to be sure that the beneficiary’s proprietary claim is not a response to a breach of duty by T, it is necessary to consider the relationship between the beneficiary’s proprietary claim and breach of fiduciary duty. This Part C.2.iii will demonstrate that the beneficiary’s proprietary claim is not available in response to breach of fiduciary duty, and further, that the proprietary claims available in response to breach of fiduciary duty are distinct from the response to T/D’s non-compliant execution, the beneficiary’s proprietary claim. Before setting out these arguments, it is necessary to make some preliminary observations about the contested nature of fiduciary loyalty, and the potential implications for concurrency between breach of fiduciary duty and the event of non-compliant execution.

⁶⁶ *Rede v Oakes* (1864) 4 DJ & S 505; *Dunn v Flood* (1885) 28 Ch D 586, 593 (Bowen LJ), 594–95 (Fry LJ).

⁶⁷ *Dunn* (n66) 593 (Bowen LJ). See also: W Gummow, ‘The Equity of Sir Frederick Jordan’ (1991) 13 SLR 263, 270–71; R Meagher, ‘Sir Frederick Jordan’s Footnote’ (1999) 15 JCL 1.

⁶⁸ *Hospital Products* (n4) 68 (Gibbs CJ), see also 96–97 (Mason J); *Breen* (n4) 92 (Dawson and Toohey JJ), 107 (Gaudron and McHugh JJ), 137 (Gummow J); *Keech* (n4).

The position as a matter of Australian law⁶⁹ is that T owes two fiduciary duties. T must not profit by reason or use of her fiduciary position⁷⁰ (*no-profit rule*), and T must avoid conflict, or the real and substantial possibility of conflict, between her self-interest and her duties to B, or duties between multiple beneficiaries (*no-conflict rules*).⁷¹ This thesis’ disaggregation of the beneficiary’s proprietary claim from breach of fiduciary duty will focus on these no-conflict and no-profit rules. However, there are ongoing debates about fiduciary loyalty, which makes it necessary to justify this approach.

One debate concerns whether other duties might also be fiduciary duties.⁷² In addition, fiduciary duties are said to be proscriptive in Australia,⁷³ although this view is subject to criticism.⁷⁴ There is also a question whether the no-profit and no-conflict rules should be understood as separate rules or as two facets of the one

⁶⁹ See eg: *Breen* (n4) 113 (Gaudron and McHugh JJ), 135–37 (Gummow J); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 [74]–[79] (McHugh, Gummow, Hayne and Callinan JJ); *Howard* (n33) [31] (French CJ), [56]–[59] (Hayne and Crennan JJ); M Conaglen, *Fiduciary Loyalty* (Hart Publishing 2010) ch 3. In England see: *Bray v Ford* [1896] AC 44, 51 (Lord Herschell); *Boardman v Phipps* [1967] 2 AC 46, 123 (Lord Upjohn).

⁷⁰ *Howard* (n33) [31] (French CJ), [56]–[59] (Hayne and Crennan JJ); *Regal Hastings v Gulliver* [1967] 2 AC 46, 143 (Lord Russell).

⁷¹ *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 392 (the Court); *Breen* (n4) 113 (Gaudron and McHugh JJ), 135 (Gummow J); *Pilmer* (n69) [74]–[79] (McHugh, Gummow, Hayne and Callinan JJ); *Howard* (n33) [31] (French CJ), [56]–[59] (Hayne and Crennan JJ); *Boardman* (n69) 124 (Lord Upjohn).

⁷² In *Bristol & West Building Society* (n33) 18 (Millet LJ), good faith and disclosure formed part of fiduciary loyalty. A sample of divergent academic views includes: Getzler (n33); Conaglen, *Fiduciary Loyalty* (n69) ch 3; S Worthington, ‘Four Questions on Fiduciaries’ (2016) 2 CJCL 723, 737–45; L Smith, ‘Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on behalf of Another’ (2014) 130 LQR 608; L Smith, ‘Aspects of Loyalty’ (SSRN, 31 July 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009894> accessed 24 April 2018.

⁷³ See eg: *Breen* (n4) 113 (Gaudron and McHugh JJ), 135–37 (Gummow J); *Pilmer* (n69) [74]–[79] (McHugh, Gummow, Hayne and Callinan JJ).

⁷⁴ L Smith, ‘Prescriptive Fiduciary Duties’ (n33); J Getzler, ‘Am I My Beneficiary’s Keeper? Fusion and Loss-Based Fiduciary Remedies’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 239. This commitment may not be as strong in other common law jurisdictions, see eg: *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244 [41]–[44] (Arden LJ; Mummery LJ and Holman J agreeing).

rule.⁷⁵ It is beyond the scope of this thesis to resolve these questions; nor is it necessary, because on this thesis’ approach, the beneficiary’s proprietary claim is not a response to a breach of duty by T, whether or not those duties are understood as *fiduciary* duties.

Finally, there is debate over whether fiduciary loyalty also encompasses requirements for the valid exercise of fiduciary power.⁷⁶ Professor Lionel Smith has argued that fiduciary power can only be validly exercised if it meets the requirement that the fiduciary subjectively believes the exercise is in the best interests of the principal.⁷⁷ Taking Professor Smith’s arguments at their highest, there is some conceptual concurrency between a requirement for the valid exercise of fiduciary power and what this thesis identifies as equity’s standards. It is submitted that there is nonetheless a critical difference between these concepts. This thesis in Chapter 3⁷⁸ demonstrated that equity’s standards apply *beyond* those powers held in a fiduciary capacity. Chapter 4 showed the availability of the claim where there is a non-compliant execution by *non*-fiduciaries.⁷⁹ Equity’s standards are thus separate to any requirement for the valid exercise of fiduciary power. *If* fiduciary loyalty encompasses Professor Smith’s requirement for the valid exercise of fiduciary power, this does not undermine this thesis’ disassociation of B’s claim from fiduciary loyalty, assuming the arguments made in this Part C.3.iii are accepted.

The final preliminary point is that facts which give rise to a breach of fiduciary duty may also demonstrate that there is a dealing with trust property that does not meet equity’s standards. Thus, in some cases where the beneficiary’s proprietary claim is available, there may also be a breach of fiduciary duty. For example, in cases like *Foskett v McKeown*⁸⁰ and *Strang v Owens*,⁸¹ there was a dealing with trust property

⁷⁵ An issue identified but not resolved in *Howard* (n33) [57] (Hayne and Crennan JJ). See also: Conaglen, *Fiduciary Loyalty* (n69) 39–40, 113–25. Cf L Smith, ‘Fiduciary Relationships’ (n72) 625–26.

⁷⁶ Smith, ‘Fiduciary Relationships’ (n72) 610–12; Smith, ‘Aspects of Loyalty’ (n72).

⁷⁷ *ibid.*

⁷⁸ Chapter 3, Parts E.1.i and E.2.

⁷⁹ Chapter 4, Part C; see also Part B above. See eg: *Cloutte* (n7); *Duke of Portland* (n5).

⁸⁰ *Foskett* (n2).

⁸¹ *Strang v Owens* (1925) 42 WN (NSW) 183.

that did not meet equity’s requirements and the beneficiary’s proprietary claim was available. In each case there would have also been a breach of fiduciary obligations, given T’s application of trust funds for self-interested purposes. Despite this potential coincidence, it is submitted that equity’s response to breach of fiduciary duty is distinct from the response to non-compliant execution. This will be demonstrated by showing: (i) that the beneficiary’s proprietary claim is available where there is no breach of fiduciary duty (Part C.2.iii.a); and (ii) that where there is only a breach of fiduciary duty, there is no beneficiary’s proprietary claim (Part C.2.iii.b). Part C.2.iii.c will explain how cases concerning self-dealing do not undermine the arguments made in this Chapter.

a. Claim available where no breach of fiduciary duty

The first reason why the beneficiary’s proprietary claim is not a response to breach of fiduciary duties is that the claim *is* available in circumstances where there is *no* breach of fiduciary duty, or even a fiduciary relationship. This point is best made in relation to those cases mentioned already in Part B, where the beneficiary’s proprietary claim is available in response to a non-compliant exercise of power held by D who is not a trustee, and does not owe fiduciary obligations in relation to the exercise of D’s power. Recall, in cases⁸² such as *Cloutte v Storey*⁸³ and *Duke v Portland v Topham*,⁸⁴ that D exercised a power of appointment for an improper purpose and the beneficiary’s proprietary claim was available in response. The powers in these cases were *not* held in a fiduciary capacity and thus there could be no breach of fiduciary duty. These cases show that the beneficiary’s proprietary claim is available when there is no breach of fiduciary duty.

b. Claim not available where only breach of no conflict or profit rules

The second reason why the beneficiary’s proprietary claim is not a response to breach of fiduciary duties is that the beneficiary’s proprietary is *not* available where there is *only a breach of fiduciary duty*. This argument is made on two bases. *First*, where there is *only* a breach of fiduciary duty and the exercise of power complies with equity’s standards, the beneficiary’s proprietary claim is not available. *Second*, the proprietary claims that are available in response to breach of fiduciary duties

⁸² See also: *Redman* (n5); *Pryor* (n5).

⁸³ *Duke of Portland* (n5).

⁸⁴ *Cloutte* (n7).

are distinct from the beneficiary’s proprietary claim. The analysis will address each of these points in relation to the no-profit rule and no-conflict rule in turn.

The no-profit rule demands that the trustee account for any profit earned by reason or use of her position.⁸⁵ Where a fiduciary earns a profit, this *may* generate a proprietary claim on the basis that the fiduciary holds the profit on trust for the principal.⁸⁶ The nature and extent of this proprietary claim is contested; however, it is submitted that any proprietary claim in relation to fiduciary profit is distinct from the beneficiary’s proprietary claim. The latter is concerned with non-compliance with equity’s standards and recovery of property from *third parties*. Any proprietary claim arising in relation to the no-profit rule is concerned with making a *fiduciary* account for profit.

Where a fiduciary is found to hold profits acquired by reason of her fiduciary position on a constructive trust, the existence of this constructive trust might provide a basis for a proprietary claim against a third-party recipient of property from the fiduciary. The distinction between this claim, and the beneficiary’s proprietary claim is addressed further in Part C.3 below.

In relation to the *no-conflict rules*, the following arguments are more complex. In summary, the beneficiary’s proprietary claim is not available in response to breach of the no-conflict rules, assuming compliance with equity’s standards. In disaggregating the beneficiary’s proprietary claim from breach of the no-conflict rule, it is necessary to first explain how facts which reveal an exercise of power that complies with equity’s standards can also reveal a breach of one or both of the no-conflict rules. The significance is to demonstrate that it possible for there to be a

⁸⁵ *Howard* (n33) [62] (Hayne and Crennan JJ); *Regal Hastings* (n70), 143, 147 (Lord Russell), 153 (Lord Macmillan), 154 (Lord Wright), 158 (Lord Porter); *Bristol & West Building Society* (n33) 18 (Millet LJ).

⁸⁶ See generally: *Chan v Zacharia* (1983) 154 CLR 178, 199 (Deane J); *Grimaldi* (n3) [575] (the Court); *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 [21], [46]–[47] (the Court); *Underhill & Hayton* (n11) [27.104]–[27.106]; S Worthington, ‘Fiduciary Duties and Proprietary Remedies’ (2013) 72 CLJ 720, 726; W Swadling, ‘Constructive Trusts and Breach of Fiduciary Duty’ (2012) 18 T&T 985; M Conaglen, ‘Proprietary Remedies for Breach of Fiduciary Duty’ (2014) 73 CLJ 490.

conflicted yet compliant exercise of power, and then to show that the beneficiary’s proprietary claim is not available in such a case.

Equity’s standards are based on objective *and subjective* factors,⁸⁷ whereas the no-conflict rules are assessed objectively. For example, fraud on a power and good faith each require proof, to some extent, of the donee’s subjective intentions. Conflict, on the other hand, is assessed *objectively* and breach can be established irrespective of the subjective intentions of the fiduciary.⁸⁸ T may breach the no-conflict rules even when acting in compliance with equity’s standards.⁸⁹ The purpose of demonstrating this distinction is that the beneficiary’s proprietary claim is not available despite the existence of conflict, provided equity’s standards are met. This argument will be made in relation to the following hypothetical: T holds a large investment fund on trust with wide powers of investment. T exercises her investment power and uses trust funds to purchase shares in ABC Pty Ltd. Due to the volume of stock purchased by T, the price of ABC shares increases. Prior to the acquisition, T held a separate parcel of shares in ABC Pty Ltd beneficially.

T is in a position of, at least, potential conflict. The degree of potentiality sufficient for breach arises where there is a real or substantial *possibility* of conflict between T’s duties and T’s self-interest.⁹⁰ On the facts, at the time T uses trust funds to acquire shares in ABC Pty Ltd, there is a *potential* conflict between T’s self-interest in relation to her personal investment in ABC Pty Ltd, and performance of her duties, including the duties to act with care, obey the trust terms, and act in good faith. T’s position of self-interest also creates a *potential* conflict with T’s compliance with equity’s standards as T *may be* tempted to exercise power self-interestedly. In addition to breach of the no-conflict rule, T may also be in breach of the no-profit rule, having regard to the fact she has made a profit in the form of the increase in price of the ABC shares, to the extent the increase can be attributed to a use of her fiduciary position.

⁸⁷ See Chapter 3, Part E.1.i.

⁸⁸ *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 558 (the Court); *Boardman* (n69) 104 (Lord Cohen); *Hart Security Australia Pty Ltd v Boucousis* [2016] NSWCA 307 [108]–[109] (Meagher JA; Bathurst CJ and Beazley P agreeing); L Smith, ‘Fiduciary Relationships’ (n72) 612.

⁸⁹ As in: *Regal Hastings* (n70) 153 (Lord Macmillan); *Boardman* (n69) 104 (Lord Cohen).

⁹⁰ See n71.

Despite the breach(es) of fiduciary duty, the beneficiary’s proprietary claim is *not* available in this hypothetical. On these facts, B would be *unable* to establish non-compliance with equity’s standards. The exercise of power is within the terms of the trust mandate. Without evidence of T’s subjective intentions, B cannot show an improper purpose or lack of bona fides. The beneficiary’s proprietary claim is not triggered by conflict alone. This is supported by Lloyd LJ’s statement in *Pitt v Holt* to the effect that a conflicted execution, provided it is made within the terms of power, for a proper purpose and bona fide, remains ‘valid and effective as regards all concerned’.⁹¹ There is some academic support for this point as well.⁹²

Nonetheless, there are other personal and proprietary remedies that may be available in response to T’s failure to avoid conflict. B might be able to seek rescission of the share sale and consequential relief for recovery of the trust funds,⁹³ in addition to claims against T. The point, however, is that B’s equity for relief in this instance is not the beneficiary’s proprietary claim. B’s claim is for rescission, which is dependent upon the third party’s knowledge, and provision of counter-restitution.⁹⁴ This is unlike the beneficiary’s proprietary claim, which, as discussed in Chapter 6 next, is not contingent upon X’s knowledge or involvement, ranks as an equitable interest that takes priority over a mere equity, and as discussed in Chapter 8, is *not* dependent upon B providing counter-restitution. On this basis, there is clearly a difference in equity’s response to breach of fiduciary duty, and a non-compliant execution (that is, the beneficiary’s proprietary claim).

Pausing here, the hypothetical also demonstrates the prophylactic function of the fiduciary duties, as they were engaged where there was the risk of a, but not an

⁹¹ *Pitt v Holt* [2013] 2 AC 108 [93].

⁹² R Nolan and M Conaglen, ‘Good Faith: What Does It Mean for Fiduciaries and What Does It Tell Us about Them?’ in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 334; Nolan (n51) 321; Smith, ‘Fiduciary Relationships’ (n72) 625; Smith, ‘Aspects of Loyalty’ (n72).

⁹³ *Maguire v Makaronis* (1997) 188 CLR 449, 463, 467–68 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, 153 (McLelland AJA; Priestley and Meagher JJA agreeing); *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 175 FLR 286 [71]–[76] (Mason P; Stein JA agreeing); Conaglen, *Fiduciary Loyalty* (n69) 77–78; *Snell’s Equity* (n51) [7-053].

⁹⁴ *ibid.*

actual, non-compliant exercise of power or breach of T’s non-fiduciary duty (such as a duty of care). On the posited facts, we cannot be sure whether T was actually motivated by an improper purpose or a lack of bona fides. The objective nature of the no-conflict rules *prevent* T from being in a position where there is a risk of non-compliant execution,⁹⁵ or a temptation to not perform T’s non-fiduciary duties.⁹⁶

This prophylactic or protective function is significant because it demonstrates how fiduciary loyalty and associated remedies have a different function to the beneficiary’s proprietary claim. B’s proprietary claim responds to the actual *eventuation* of a non-compliant execution. Fiduciary duties, on the other hand, protect or caution against the fiduciary being in a position where there is a risk of a non-compliant execution, or breach of duty. This distinction in function between *prophylaxis* and the *assurance* will be discussed in more detail in Chapter 9.

To be sure of the disassociation between the beneficiary’s proprietary claim and breach of fiduciary duties, it is necessary to explain how this argument can be sustained in the context of self-dealing. That is the aim of the next Part C.2.iii.c.

c. *Self-dealing*

The self-dealing rule applies to fiduciaries, such as T, and proscribes T (or another fiduciary), or her nominee, from acquiring title to property held subject to the fiduciary relationship.⁹⁷ There are some cases that could be understood as suggesting that the beneficiary’s proprietary claim is available in response to a transaction that infringes this rule.⁹⁸ *To the extent* that the self-dealing rule is

⁹⁵ L Smith, ‘Deterrence, Prophylaxis and Punishment in Fiduciary Obligations’ (2013) 7 J Eq 87, 97–98.

⁹⁶ Conaglen, *Fiduciary Loyalty* (n69) 61–72; M Conaglen, ‘The Nature and Function of Fiduciary Loyalty’ (2005) 121 LQR 452.

⁹⁷ See generally: *Campbell v Walker* (1800) 5 Ves 678, 680 (Arden MR); *Tito v Waddell (No 2)* [1977] Ch 106, 225, 241 (Megarry VC); *Ingram v IRC* [1997] 4 All ER 395, 425, 426 (Millett LJ); M Conaglen, ‘A Re-Appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules’ (2006) 65 CLJ 366; M Conaglen, *Fiduciary Loyalty* (n69) 78–79, 126–28.

⁹⁸ See eg: *Glennon v FCT* (1972) 127 CLR 503, 513 (Walsh J); *Clay v Clay* (2001) 202 CLR 410 [51] (the Court); B McPherson, ‘Self-Dealing Trustees’ in A Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press 1997) 135–48.

understood as a specific emanation of the no-conflict rule,⁹⁹ then the availability of the beneficiary’s proprietary claim in response to self-dealing might suggest that that claim *is* available in response to breach of the no-conflict rule, contrary to the arguments made above. Thus, it is necessary to explain how this Chapter’s argument can be sustained in the face of these cases.

It is submitted that, properly understood, the circumstances of T’s self-dealing can sometimes infringe the no-conflict rule *and* also be a non-compliant exercise of power. The beneficiary’s proprietary claim is triggered by the non-compliant exercise, not by the conflict per se. As explained by Millett LJ, T’s power of sale does not permit T to engage in self-dealing;¹⁰⁰ for example, ‘[a] sale to [T’s] ... nominee, being unauthorised, is incapable of overreaching the interests of the beneficiaries’.¹⁰¹ The beneficiary’s proprietary claim is triggered where T’s self-dealing is also a non-compliant execution, not a breach of the no-conflict rule. In support of this argument is the observation that the beneficiary’s proprietary claim is not available where there is self-dealing that infringes the no-conflict rule but nonetheless complies with equity’s standards.¹⁰²

3. Other proprietary claims in response to breach of fiduciary duty

Part C.2.iii argued that the beneficiary’s proprietary claim is not triggered by a breach of fiduciary duty. To be sure of this, in this argument it is necessary to address the availability of proprietary claims *against a non-trustee fiduciary*, and *subsequent knowing recipient* in response to the fiduciary’s misapplication of property. This is particularly important in light of two cases that contain statements which might suggest that the beneficiary’s proprietary claim is available in response to breach of fiduciary duty outside of express trusts. For the reasons discussed next,

⁹⁹ See eg: *Re Thompson’s Settlement* [1986] 1 Ch 99, 115 (Vinelott J); *Ingram* (n97) 425, 426 (Millett LJ); M Conaglen, ‘A Re-Appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules’ (n97) 370.

¹⁰⁰ Subject to authorisation in the trust terms, the beneficiaries’ or court approval.

¹⁰¹ *Ingram* (n97) 425 (Millett LJ dissenting), *affd* on appeal [2000] 1 AC 293, 305 (Lord Hoffman; Lord Browne Wilkinson, Lord Steyn and Lord Clyde agreeing), 310 (Lord Hutton). See also: *Glennon* (n97) 513 (Walsh J); *Clay* (n97) [51]; *Lewis v Hillman* (1852) 3 HL Cas 607; *Farrar v Farrars Ltd* (1888) 40 Ch D 395; O’Sullivan, Elliott and Zakrzewski (n38) [1.73]–[1.75].

¹⁰² See also: Nolan (n51) 321.

these cases are best understood as concerning the proprietary claim against a fiduciary who acquires property from the fiduciary relationship and which in consequence is held subject to a constructive trust, or the proprietary claim against a third party who acquires property held subject to a constructive trust by a fiduciary. These cases do not concern the beneficiary’s proprietary claim; nor should they be understood as extensions of this claim where there is a breach of fiduciary duty.

To make out this argument, this Part C.3 will: (i) briefly outline these two cases; and set out this Part’s alternative arguments that these cases either: (ii) do not concern the beneficiary’s proprietary claim; or (iii) concern the beneficiary’s proprietary claim as made available in relation to the constructive trust imposed upon a fiduciary or knowing recipient *as if she were an express trustee*.

i. The cases

The first case is *United States Surgical Corp v Hospital Products International Pty Ltd*, where the New South Wales Court of Appeal raised the ‘possibility’ that property acquired by a fiduciary, including a partner, in breach of fiduciary duties, and then transferred to X, could be ‘trust property in the strict sense’ so that X ‘would have received trust property (in the strict sense) and would be bound by the trusts affecting the same’.¹⁰³

United States Surgical Corp was relied upon by Gzell J in the second case, *Lowe v Pascoe (No 4)*.¹⁰⁴ His Honour found that the concept of a ‘trust in the strict sense’¹⁰⁵ extended to a constructive trust that arises where a partner acquires title to partnership property in breach of fiduciary duty.

Taking these two cases at their highest, their significance is that they might tend to the view that breach of fiduciary duty *is the event* relevant to the beneficiary’s proprietary claim. It is submitted that this is not the case for the following alternative reasons.

¹⁰³ *United States Surgical Corp v Hospital Products International Pty Ltd* (1983) 2 NSWLR 157, 247 (the Court). This aspect of the judgment was neither raised nor questioned on appeal to the High Court in *Hospital Products* (n4).

¹⁰⁴ *Lowe v Pascoe (No 4)* [2012] NSWSC 1493.

¹⁰⁵ *Lowe* (n104) [28]–[29].

ii. The cases did not concern the beneficiary’s proprietary claim

The proprietary claims in these cases were not, properly understood, the beneficiary’s proprietary claim. Thus, to the extent that these cases demonstrate the availability of proprietary claims in response to breach of fiduciary duty, they do not tend to the view that the beneficiary’s proprietary claim is triggered by fiduciary breach. To make this argument, it is necessary to consider both cases in more detail.

In *United States Surgical Corp v Hospital Products International Pty Ltd*,¹⁰⁶ the New South Wales Court of Appeal found that a fiduciary held property acquired in breach of fiduciary duties on constructive trust for the plaintiff.¹⁰⁷ This finding was not determinative of the case because the fiduciary had transferred the subject property to X, and it was necessary to decide whether the plaintiff could assert a proprietary claim against X. The plaintiff’s claims against X were described in terms of X’s *knowing receipt* or *knowing assistance* in respect to the fiduciary’s breach of its duties as a constructive trustee of the misapplied property.¹⁰⁸ In considering these claims, the New South Wales Court of Appeal found that the concept of ‘trust property in the strict sense’ could be extended from an express trust to a constructive trust of the kind in issue in this case. Thus, these comments should be confined to the claims based on knowing receipt and knowing assistance, and not extended to the beneficiary’s proprietary claim.

Turning now to *Lowe v Pascoe (No 4)*,¹⁰⁹ Gzell J found that *the beneficiary’s proprietary claim*¹¹⁰ extended to property held subject to a constructive trust that arises where a partner acquires title to partnership property and then transfers that title to a third party, X. With respect, it is submitted that this reasoning is wrong given Gzell J’s reliance upon *United States Surgical Corp v Hospital Products* as

¹⁰⁶ *United States Surgical Corp* (n103) 208–09. The existence of a fiduciary relationship was overturned on appeal in relation to the existence of a fiduciary relationship in *Hospital Products* (n4).

¹⁰⁷ *United States Surgical Corp* (n103) 233–38.

¹⁰⁸ *United States Surgical Corp* (n103) 243–53, referring to *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 396 (Gibbs J).

¹⁰⁹ *Lowe* (n104) [29]–[42].

¹¹⁰ *Lowe* (n104) [28]–[29].

permitting such an extension. His Honour’s reliance is problematic because, and for the reasons just discussed, *United States Surgical Corp* concerned an extension for the purposes of knowing receipt liability, not the beneficiary’s proprietary claim. Gzell J’s reasons were not expressly overruled on appeal,¹¹¹ but the New South Wales Court of Appeal based the availability of a proprietary claim on a different ground:¹¹² relevantly, a constructive trust that arises in relation to receipt of stolen property, which was distinguished from B’s claim in Chapter 1.¹¹³

If we accept this argument, then, *United States Surgical Corp* and *Lowe v Pascoe (No 4)* should not be understood as undermining this thesis’ argument. These cases do *not* support the view that the beneficiary’s proprietary claim is available in response to breach of fiduciary duty. These cases are best understood as demonstrating the existence of other proprietary claims that are available where a fiduciary misappropriates property from a fiduciary relationship.

iii. Proprietary claim in respect of constructive trusteeship

Even if the argument in Part C.3.ii is not accepted, and the proprietary claims contemplated in *United States Surgical Corp* and *Lowe v Pascoe (No 4)* are viewed as the beneficiary’s proprietary claim, there is an alternative argument why these cases do not undermine this thesis’ disaggregation of the beneficiary’s proprietary claim from fiduciary breach. In summary, the availability of the beneficiary’s proprietary claim in respect of property held subject to a constructive trust by a fiduciary, or other knowing recipient, is consistent with the arguments in this thesis, *having regard to* the nature of the particular constructive trusteeship in these two cases.

Both *United States Surgical Corp* and *Lowe v Pascoe (No 4)* concerned a misapplication and receipt of property by a fiduciary, and subsequent receipt by a knowing recipient. It is uncontroversial that a constructive trust arises against a

¹¹¹ *Sze Tu v Lowe* (2014) 89 NSWLR 317 [211], [217], [262] (Meagher and Barrett JJA agreeing).

¹¹² *Sze Tu* (n111) [27] (Gleeson JA; Meagher and Barrett JJA agreeing), referring to *Black v S Freedman & Co* (1910) 12 CLR 105, 110.

¹¹³ Chapter 1, Part C.1.ii.

fiduciary who acquires property from the fiduciary relationship,¹¹⁴ such as a distributor agent in *United States Surgical Corp*, or a partner in *Lowe*, or the subsequent *knowing recipients* in both cases. Further, and critically, the constructive trust in these scenarios is one that imports the full accountability *as if constructive trustee were an express trustee*.¹¹⁵

It is submitted that the particular nature of constructive trusteeship in these cases also imports equity’s standards and, thus with it, the beneficiary’s proprietary claim. The beneficiary of the constructive trusts in *United States Surgical Corp* and *Lowe* could assert a proprietary claim against X who received property from the errant fiduciary who held the subject property as if they were an express trustee. The significance is that B’s claim is a response to a non-compliant exercise of power by the constructive trustee as if she were an express trustee. The constructive trusteeship is a response to the fiduciary’s antecedent breach of fiduciary duty, or recipient’s knowing receipt. If so, then this thesis’ arguments that the beneficiary’s proprietary claim is a response to a non-compliant execution by a trustee and *not* a response to breach of fiduciary duty, are maintained.

Finally, these arguments apply to the scenario where a fiduciary or knowing recipient holds property on constructive trust *as if they were an express trustee*. There are other proprietary claims available to recover property held subject to a fiduciary relationship where the fiduciary causes the property to be transferred directly to an *innocent* third party from the principal.¹¹⁶ The key distinction is that the misappropriated property does not pass through the hands of an errant fiduciary or a knowing recipient, and so no constructive trust analogous to the constructive trusts in *United States Surgical Corp* and *Lowe* arises (assuming the

¹¹⁴ A small sample of cases includes: *Grimaldi* (n3) [252]–[256] (the Court); *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474, 479 (Jessel MR); *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467 [25]–[28].

¹¹⁵ See eg: *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 408–09 (Millett LJ); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 [81] (Lloyd LJ); *Williams v Central Bank of Nigeria* [2014] AC 1189 [31]; C Mitchell and S Watterson, ‘Remedies for Knowing Receipt’ in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 128–31; *Underhill & Hayton* (n11) [98.2], [98.33].

¹¹⁶ See eg: *Great Investments Ltd v Warner* (2016) 243 FCR 516; *Clegg v Pache* [2017] EWCA Civ 256.

third party is innocent and not a knowing recipient). Thus, any proprietary claim against the innocent third party cannot be grounded upon an antecedent constructive trust against the fiduciary.

As will be discussed further in Chapter 9, there is debate about the juridical basis for these other proprietary claims where an innocent third party acquires property misappropriated from a fiduciary relationship. It has been suggested that the beneficiary’s proprietary claim is available by way of an analogy between the express trust and some fiduciary relationships.¹¹⁷ Chapter 9 advocates a different approach that distinguishes between the beneficiary’s proprietary claim and other proprietary claims *against innocent third parties* in relation to property misapplied from fiduciary relationships.

D. Conclusion

This Chapter has argued that the beneficiary’s proprietary claim is not available in response to wrongdoing by T or D. It has explained the potential concurrency of a non-compliant exercise of power, and wrongdoing in the sense of breach of a trustee’s duty. This Chapter has argued that the beneficiary’s proprietary claim is nonetheless best understood as a response to a non-compliant exercise of power rather than wrongdoing. The significance of these arguments is to counter previous views to the effect that the beneficiary’s proprietary claim is a response to wrongdoing,¹¹⁸ and to further isolate a non-compliant execution as the event relevant to the beneficiary’s proprietary claim.

¹¹⁷ See eg: *Clegg* (n116) [87] (Briggs LJ; Thirlwall and McCombe JJ agreeing); R Chambers and J Penner, ‘Ignorance’ in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008) 271, see also 273; *Lewin on Trusts* (n2) [7-018], [41-011].

¹¹⁸ See n2.

Chapter 6 – X's responsibility

A. Introduction

This thesis has now reached a juncture in its analysis as it moves from consideration of the event relevant to the beneficiary's proprietary claim and the extent of B's equity for relief, to consideration of X's responsibility. This Chapter considers: (i) the *content* of X's responsibility, that is precisely what X is required to do, or not do, to satisfy B's claim; (ii) the *form* of X's responsibility, that is whether X's responsibility is best understood as a duty, or in terms of another legal relationship; and (iii) the *conditions* for X's responsibility, for example whether knowledge, or retention of specific property, are conditions for X's responsibility. The analysis in this Chapter has important implications for this thesis' account of the function and justification for the claim in Chapter 9, and for this thesis' arguments in Chapter 10 regarding unjust enrichment.

In summary, this Chapter will argue that: (i) the content of X's responsibility is that X is required to exercise her powers over the subject property as necessary so that it is as if the non-compliant execution had not occurred, for example convey title to specific property to T; (ii) the form of that responsibility is that X is subject to a liability rather than a duty; and (iii) the condition for X's responsibility is X's *retention of the subject property*.

There are some challenges to making out these arguments. In particular, the condition for X's responsibility requires consideration of how the extension of the claim to traceable substitutes renders B's interest as asserted by the claim inchoate in nature. Further, on this thesis' account, X's responsibility is strict in the sense that it does not depend upon wrongdoing or knowledge. X's strict responsibility presents a justificatory challenge, having regard to the form of that responsibility as a liability rather than a duty.

The final preliminary comment relates to nomenclature. This thesis has so far referred to 'X's *responsibility*' rather than 'X's *duty*' or 'X's *liability*'. As will be discussed in more detail below, this is because there is an issue whether, properly understood, X is subject to a duty or some other legal relationship. Thus, and for now, reference will be made to 'X's *responsibility*'.

This Chapter will proceed as follows. Part B will set out this thesis’ characterisation of the content of X’s responsibility. Part C will set out this thesis’ account of the form of X’s responsibility. Part D will explain the condition for X’s responsibility, as well as consider the implications arising from extension of the claim to traceable substitutes. Part E will demonstrate that X’s knowledge is not a condition for X’s responsibility and explain how X’s strict liability can be justified having regard to the form of her responsibility as a liability to court orders.

B. X’s responsibility – content

The *content* of X’s responsibility refers to what X is required to do, or not do, to satisfy B’s claim. The content of X’s responsibility is a function of B’s equity for relief, and some of the preliminary analytical work has been done already in this thesis in relation to this issue. Chapter 4¹ argued that B’s equity is for relief necessary so that it is as if the non-compliant execution had not occurred, for example by reconveying title to the subject property, or paying the monetary equivalent of that property to T.

Chapter 4² also explained how the extent of B’s equity for relief can be understood in terms of a disability-immunity relationship. Specifically, B’s equity is for relief necessary to place B in the position, or near enough, as if her interest had been *immune* from the non-compliant execution, and as if T/D had been *disabled* from exercising the impugned power. X’s responsibility is to satisfy B’s equity for relief. Having regard to the extent of B’s equity for relief, the content of X’s responsibility is to exercise X’s powers over the subject property as necessary to place B in the position, or near enough, as if her interest had been immune from the non-compliant execution, and as if T/D had been disabled from exercising the impugned power. We will return to the disability-immunity relationship in Part C.4.v below.

There are other questions about X’s responsibility that have not yet been examined. One is the form or presentation of X’s responsibility, for example whether X should be understood as subject to a *duty* or *liability*. As mentioned already, this thesis has deliberately referred to X’s ‘responsibility’, as it is an open question whether the beneficiary’s proprietary claim gives effect to X’s duty or liability, or some other

¹ Chapter 4, Part D.1.

² Chapter 4, Part D.1.i.

legal relationship. Another question concerns the conditions for X's responsibility, such as knowledge or retention of property. The aim of the rest of this Chapter is to answer these questions. Part C next will consider the form of X's responsibility, that is whether X should be understood as subject to a duty or some other legal relationship.

C. X's responsibility – form

1. The form of X's responsibility – outline

This Part C sets out this Chapter's characterisation of X's responsibility to the beneficiary's proprietary claim. The *form* of X's responsibility refers to the precise legal relationship or juridical requirement to which X is subject in response to the event of non-compliant execution. There is some controversy about the characterisation of the form of X's responsibility, that is whether X is subject to a duty or some other legal relationship, such as a liability. On one approach, X is subject to a liability to court orders (*the liability approach*).³ On another approach, X owes a *duty* to make restitution to B of the subject property (*the duty approach*).⁴ Resolution of this issue is important for this thesis' account of the claim in Chapter 9, and in particular the justification of the condition for X's responsibility in Part E below.

In outline, this Part C will make two main arguments as to the form of X's responsibility to the beneficiary's proprietary claim: *first*, that X is not subject to a

³ See eg: S Smith, 'Rights, Remedies and Causes of Action' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing 2008) ch 20; S Smith, 'Duties, Liabilities and Damages' (2011–12) 125 HLR 1727; S Smith, 'A Duty to Make Restitution' (2013) 26 CJLJ 157. See also: N McBride, 'Stephen A Smith on Duties and Liabilities' (2015) University of Cambridge Faculty of Law Research Paper No 62/2015 <<https://ssrn.com/abstract=2668742>> accessed 1 October 2018; S Worthington, 'Exposing Third-Party Liability in Equity' in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 350; S Agnew, 'The Meaning and Significance of Conscience in Private Law' (2018) 77 CLJ 479; N McBride, *The Humanity of Private Law* (Hart Publishing 2018) 54–63.

⁴ See eg: S Agnew and B McFarlane, 'The Paradox of the Equitable Proprietary Claim' in S Agnew and B McFarlane (eds), *Modern Studies in Property Law* (10th edn, Hart Publishing 2019) 304–05. See also: R Nolan, 'Equitable Property' (2006) 122 LQR 232, 236–38, who characterises B's interest against X as a 'right' which assumes X is under a duty to B.

duty; and *second*, that X is best understood as being subject to a liability to court orders.

These arguments raise further analytical instabilities, such as the true meaning of a duty, and whether equitable relief is available to give effect to legal relationships other than duty-right relations. These instabilities are beyond resolution in this thesis. To explain why X is not subject to a duty, the analysis will draw upon the work of scholars who favour the liability approach and will apply their method to distinguish between a duty and liability.

To make out this Part C's arguments the analysis will demonstrate that: (i) X is not subject to a duty by using the method developed by proponents of the liability approach (Part C.2); (ii) X is not subject to T's duties and the beneficiary's proprietary claim does *not* represent the persistence or transmission of T's duty owed to B, against X (Part C.3); and (iii) X should be understood as subject to a liability in response to the event of non-compliant execution (Part C.4).

2. X is not subject to a duty

This Part C.2 will demonstrate that X is not subject to a duty by drawing upon the work of proponents of the liability approach to distinguish between a duty and liability. This Part will: (i) set out the liability approach, its method for distinguishing a duty, and explain its relevance to this thesis; and (ii) apply that approach to X's responsibility to demonstrate that it is not a duty.

i. The liability approach

Professor Stephen Smith is one of the main advocates of the liability approach, and has argued that the requirement for a recipient to make restitution should be understood as a liability to court orders, rather than a duty.⁵ One method used by Professor Smith to distinguish between a liability and a duty is to ask whether X is subject to secondary repercussions for her failure to comply with a given juridical requirement. If there are no secondary repercussions, then the requirement is not a duty. On the other hand, if there are secondary repercussions, then the requirement is a duty.

⁵ See n3.

This method is based on the Austinian distinction between primary and secondary duties,⁶ according to which breach of a primary duty results in a secondary duty, for example to pay compensation or make restitution. Applying this method, Professor Smith argues that a recipient is not subject to a primary duty to make restitution if she is not subject to a secondary duty for her failure to comply with the relevant juridical requirement.⁷

It must be conceded that the premise of Professor's Smith's argument has been criticised.⁸ The premise is, relevantly, that a given juridical requirement can only be identified as a duty if a failure to comply results in secondary duties, such as a further duty to pay compensation. The criticism is that there are some primary *duties* that do *not* give rise to secondary duties, so that the absence of secondary duties is not a sufficient indicator of the existence of a primary duty.

However, Professor Smith's method retains some relevance to this thesis, because the duties thought to be imposed upon X by proponents of the duty approach⁹ *do* usually have secondary repercussions for breach. The duty approach characterises X's responsibility as being the same as that of a knowing recipient.¹⁰ As discussed already in this thesis, a knowing recipient is subject to a primary duty to return trust property, breach of which results in a secondary duty, for example to account for the value of the dissipated property.¹¹ *If*, contrary to the position taken in this thesis, the beneficiary's proprietary claim gives effect to these same primary duties, then one might expect X to be subject to similar secondary duties if X breaches the

⁶ J Austin, *Lectures on Jurisprudence* (R Campbell ed, 3rd edn, 1869) 794–99. The distinction between primary duty-right relationships, and secondary duty-right relationships arising in response to breach of a primary duty, received judicial endorsement in *Moschi v LEP Air Services Ltd* [1973] AC 331, 350; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848–49. See further: P Birks, 'Rights, Wrongs and Remedies' (2000) 20 OJLS 1, 5–6.

⁷ S Smith, 'A Duty to Make Restitution' (n3) 169–70.

⁸ McBride, 'Stephen A Smith on Duties and Liabilities' (n3) 7–8.

⁹ See eg: Agnew and McFarlane (n4) 304–05.

¹⁰ *ibid.*

¹¹ *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 [81] (Lloyd LJ); *Williams v Central Bank of Nigeria* [2014] AC 1189, [31] (Lord Sumption); C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 128–38; C Mitchell, D Hayton and P Matthews, *Underhill & Hayton: Law of Trusts and Trustees* (19th edn, LexisNexis 2016) [98.33].

primary duty to return trust property. Professor Smith's method is thus applicable, as it demonstrates that whatever juridical requirements X is subject to, these are not the same duties as those of a knowing recipient.

ii. The liability approach applied to distinguish X's responsibility from a duty

The following discussion will apply Professor Smith's method to show that X is not subject to any secondary duties from a failure to return the subject property, and thus is not subject to a duty to do so. This is demonstrated by cases such as *Re Montagu's Settlement Trusts*,¹² and *Krnjulac v Lincu*,¹³ where X was not subject to any secondary repercussions for a failure to return the trust property. In both cases, X acquired title to the subject property, and subsequently dealt with or disposed of the property, so that by the time of trial, X either no longer retained the subject property, as in *Re Montagu's Settlement Trusts*, or the subject property was now encumbered in favour of a third-party mortgagee, as in *Krnjulac*. In both cases, X's responsibility only extended to the title that X had at the time of judgment. Thus, in the scenario where X no longer retained the property, she had no responsibility, as in *Re Montagu's Settlement Trusts*.¹⁴ In *Krnjulac* X was required to return the encumbered title.¹⁵ Critically, in neither case was X subject to further responsibility. X was not, for example, required to pay compensation for loss caused by her failure to return the subject property (unencumbered in the case of *Krnjulac*).

If the position were otherwise, and the beneficiary's proprietary claim presupposed that X was subject to a *duty* to return the subject property, then the outcome of these cases would have been different. X would have been liable to account for the property or required to pay equitable compensation for the loss caused by her breach of duty to return the subject property (unencumbered in *Krnjulac v Lincu*). However, this was not so in either case.

These cases illustrate that, whatever is the true nature of X's responsibility, X does not owe a duty to not use property for her own benefit and return the subject

¹² *Re Montagu's Settlement Trusts* [1987] 1 Ch 264.

¹³ *Krnjulac v Lincu* [2015] NSWCA 367.

¹⁴ *Re Montagu's Settlement Trusts* (n12) 272, 286.

¹⁵ *Krnjulac* (n13) [24].

property. As much was summed up by Megarry VC in *Re Montagu's Settlement Trusts*:

If when the truth emerges [X] ... still has the property he must restore it, whereas if he no longer has either the property or its traceable proceeds, he is under no liability, unless he has become a constructive trustee.¹⁶

Megarry VC's reference to X becoming a constructive trustee refers to the liability of a knowing recipient, which *does* impose duties upon X.¹⁷ Whereas, and as discussed in Chapter 4,¹⁸ the constructive trust that may arise in relation to the beneficiary's proprietary claim refers only to X being subject to orders for reconveyance of the subject property. At the risk of repetition, it is important to be clear that the same label 'constructive trusteeship' is being used to describe different phenomena. The fact that the same label is used does not mean that the beneficiary's proprietary claim imposes duties on X as if she were accountable for the property in the same way as a knowing recipient.

The above cases demonstrate that X is not subject to any secondary duties for her failure to return the subject property. This is one reason why this thesis does not characterise X's responsibility as a duty.

3. X is not subject to T's duty

Another reason why this thesis does not characterise X's responsibility as a duty is that X is not subject to T's duties. Contrary to this thesis' position, other scholars have previously argued that the beneficiary's proprietary claim represents the transmission or persistence of T's duty to not use property for her own benefit against X. According to this view, *X is subject to a duty* to return the trust property.¹⁹ To be sure in this thesis' argument that T is not subject to a duty, it is important to address the contrary view that B's claim represents the transmission or persistence of T's duty against X. That is the aim of this Part C.3.

¹⁶ *Re Montagu's Settlement Trusts* (n12) 271.

¹⁷ See n11.

¹⁸ Chapter 4, Part D.1.

¹⁹ See eg: B McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 31; B McFarlane and R Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1, 4–6; Agnew and McFarlane (n4) 304–05.

Some of this work has been done already in Chapter 2, which argued that the interest asserted by the beneficiary's proprietary claim, referred to as *B's interest against X*, is separate and distinct from the interest that encompasses the duty-right relations between T and B, referred to as *B's interest against T*. Support for this argument can be drawn from the cases that expressly distinguish between these two interests.²⁰

In addition, and drawing on the analysis in Chapter 4, it is now possible to show that the content of T's duties is different to the content of X's responsibility. At a minimum, T owes the irreducible core of trust duties, including the obligation to obey the trust terms, and perform the trust honestly and for the benefit of B.²¹ The content of X's responsibility is different. Chapter 4²² and Part B above show that the content of X's responsibility is to exercise her powers over the subject property as necessary to place B in the position as if the non-compliant execution had not occurred. The content of X's responsibility is thus very different to T's duties.

In addition to the different content of T's duty and X's responsibility, two further arguments can be made why X's responsibility should not be understood in terms of the transmission of T's duty to X: (i) X is not subject to any secondary repercussions in the event that X fails to return the subject property, which was explained above in Part C.2; and (ii) there is a distinction between the beneficiary's proprietary claim and knowing receipt, which is a distinction drawn in Chapter 1, and discussed in more detail now.

As explained by scholars, knowing receipt replicates parts of the initial legal relationship between T and B, as between B and X.²³ As a knowing recipient, X comes under primary duties in relation to her exercise of power over the subject property, for example 'a duty not to part with the remaining funds ... otherwise

²⁰ *Akers v Samba Financial Group* [2017] AC 424 [82] (Lord Sumption).

²¹ *Armitage v Nurse* [1998] Ch 241, 253–54 (Millet LJ). See also: *DKLR Holding Co (No 2) Pty Ltd v Comr Stamp Duties* [1980] 1 NSWLR 510, 518–19 (Hope JA).

²² Chapter 4, Part D.

²³ Mitchell and Watterson (n11) 128–38; *Underhill & Hayton* (n11) [98.33]; Agnew and McFarlane (n4) 305.

than by restoring them to or for the benefit of the beneficiaries'.²⁴ This form of liability also supports a proprietary claim against X which is separate to the beneficiary's proprietary claim.²⁵

It has been argued that *the beneficiary's proprietary claim* is the transmission or persistence of B's initial interest against T, *against X*. This argument is based on the assertion that the beneficiary's proprietary claim is part of the same phenomenon as knowing receipt.²⁶ With respect, it is submitted that this approach is flawed because the two doctrines are distinct. As Chapter 4²⁷ and Part B above showed, X's responsibility to the beneficiary's proprietary claim is to exercise her powers over the subject property as necessary to place B in the position as if the non-compliant execution had not occurred. This responsibility is thus very different to the trust duties imposed upon X as a knowing recipient. As emphasised in cases before,²⁸ knowing receipt and the beneficiary's proprietary claim are different phenomena, and what is true for one may not be so for the other.

In summary, X's responsibility to the beneficiary's proprietary claim should not be understood as the persistence or replication of the trust duty as between T and B,

²⁴ *Re Montagu's Settlement Trusts* (n12) 272; *Independent Trustee Services* (n11) [81] (Lloyd LJ).

²⁵ *Independent Trustee Services Ltd* (n11) [81] (Lloyd LJ); *Williams* (n11) [31]; Mitchell and Watterson (n11) 131–47.

²⁶ Agnew and McFarlane (n4) 305: 'We therefore argue that each of the knowing receipt claim, and [the beneficiary's proprietary claim], is founded on exactly the same duty of C to B, and is indeed simply a different means to give effect to that duty. We therefore argue that cases discussing the knowing receipt claim can provide valuable insights into the nature of, and limits to, the equitable proprietary claim.'

²⁷ Chapter 4, Part D.

²⁸ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 [267] (the Court); *Fistar v Riverwood Legion & Community Club Ltd* (2016) 91 NSWLR 732 [44] (Leeming JA); *Re Montagu's Settlement Trusts* (n12) 271–73; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747, 758 (Millett J): 'The distinction, which is crucial, may have been lost sight of in the language of some of the more recent decisions on knowing receipt'; *Nabb Bros Ltd v Lloyds Bank International (Guernsey) Ltd* [2005] EWHC 405 [69]–[72] (Lawrence Collins J).

to X.²⁹ Whatever is the interest and precise legal relationship between B and X that is presupposed by the claim, it is different to B's interest against T.

4. X's responsibility as a *liability*

i. X is subject to a liability to court orders

Having set out this thesis' reasons why X should not be understood as subject to a duty, this Part C.4 sets out this thesis' positive account of the form of X's responsibility. In summary, X should be understood as subject to a liability to court orders. As discussed above in Part C.2.i, Professor Stephen Smith has argued that a recipient comes under a *liability* to court orders requiring restitution, rather than a *duty* to make restitution to the claimant.³⁰ Professor Smith has not considered the form of X's responsibility to the beneficiary's proprietary claim in particular, although others have. According to these other views, X is subject to a liability to make restitution that corresponds to B's right to restitution.³¹

This thesis adopts a similar position. It is submitted that the form of X's responsibility in response to a non-compliant execution is a liability to court orders, which corresponds to B's equity for relief.³² The beneficiary's proprietary claim is

²⁹ See also: M Bryan, 'The Liability of the Recipient' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 330–31.

³⁰ See n3.

³¹ W Swadling, 'The Nature of Knowing Receipt' in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 309–11.

³² Cf P Jaffey, 'Explaining the Trust' (2015) 131 LQR 377, 395; P Jaffey, 'Hohfeld's Power-Liability/Right-Duty Distinction in the Law of Restitution' (2004) CILJ 295, 304–05, who argues that the event of an invalid transfer by T results in B acquiring a restitutionary *power* to make X make restitution of property, and X becoming subject to a primary restitutionary liability. This characterisation of B's power may be correct to the extent that it refers to B's *factual* or *causative* power to commence legal proceedings against X, which subjects X to a liability to court orders to make restitution. However, Jaffey's characterisation is not correct in relation to *who* has a power to 'make' X provide restitution. Leaving aside B's factual power to decide whether to commence proceedings against X, it is *the court*, not B, that has the power to impose a *duty* upon X to make restitution to give effect to the substantive legal relationship presupposed by the beneficiary's proprietary claim. B cannot 'make' X, who is otherwise the titleholder of the subject property, do anything in relation to that property. The distinction between powers whose exercise has a legal or normative effect and powers whose exercise has a factual or causative effect has been observed before, see eg: J Raz, *Practical Reason and Norms* (2nd edn, OUP 1999) 103; C Essert, 'Legal Powers in Private Law' (2015) LT 136, 139–45.

B's assertion of her entitlement to such relief against X. As will be discussed in Part E below, the immediate implication is that the concern that X is subject to a duty without sufficient knowledge is not applicable. On this thesis' account, X is not subject to a duty without knowledge. By the time X is subject to a duty to comply with a court order, X will have sufficient knowledge to permit her compliance with that duty.

However, this thesis' adoption of the liability approach does raise other analytical instabilities. It is necessary to explain these instabilities and assess their implications for this thesis; this is the aim of the next Parts C.4.ii–v.

ii. Analytical instabilities arising from liability approach

The liability approach raises the question, what is the substantive legal relationship to which X's liability to court orders gives effect? The liability approach focuses upon X's relationship with a court, and subsequent duty to comply with a court order. This approach does not, however, articulate the relationship between B and X, which may be relevant to assessing the nature of X's liability to court orders. Therefore, the liability approach does not, according to its own terms, acknowledge or answer the question of the relationship to which X's liability to court orders gives effect.

To explain this issue, its implications, and this thesis' resolution, the analysis will draw on the work of other scholars³³ to delineate different sets of rights and legal relations, being: (a) substantive legal relations (also referred to as 'ordinary private rights'³⁴); (b) action-rights; and (c) court-ordered rights.

a. Substantive legal relationships

A *substantive legal relationship* is a legal relationship that 'exists prior to a judicial determination' and arises in response to a causative event.³⁵ For example, B's right

³³ These distinctions and definitions are drawn from: Birks, 'Rights, Wrongs and Remedies' (n6) 14–16, 30–31; R Zakrzewski, 'The Classification of Judicial Remedies' [2003] LMCQ 477, 481–83; S Smith, 'Rights, Remedies and Causes of Action' (n3) 406–13; S Smith, 'Rights and Remedies: A Complex Relationship' in R Sharpe and K Roach (eds), *Taking Remedies Seriously* (Canadian Institute for the Administration of Justice 2010) 40–42.

³⁴ S Smith, 'Rights and Remedies: A Complex Relationship' (n33) 40–42.

³⁵ See further: Birks, 'Rights, Wrongs and Remedies' (n6) 21; Zakrzewski (n33) 481.

to compensation from T, and T's correlative duty to pay, arise in response to the event of the trustee's breach of her primary duties. This duty-right relationship is substantive and arises independently of an order of a court.

b. Action-based rights

Action-based rights are the legal relations between the court and the parties. Bearing in mind the discretionary nature of equitable remedies, and the non-absolute nature of B's 'right' or equity for relief,³⁶ B can be understood to have an entitlement or equity for relief that can be viewed as her 'action-right' to such relief *against a court*. There is a corresponding relationship between *the court and X* prior to issuance of a court order. This relationship can be described as X's liability to court orders.

c. Court-ordered rights

Court-ordered rights are available to give effect to the parties' substantive legal relations. For example, an order that T pay \$50 to B imposes a duty on T to pay B which correlates to B's right to the payment of \$50 from T. Court orders create further legal relations between the parties to litigation and give effect to the prior substantive legal relationship between B and T according to which T has a duty to pay, and B a correlative right to receive payment.

iii. *Liability approach and duty approach are concerned with different sets of relationships*

The significance of the different sets of legal relationships set out in Part C.4.ii above is that they show how the liability approach and the duty approach are concerned with different sets of relationships. The liability approach focuses on characterising the *action-based rights and liabilities* (category (b) above) between *the court and the parties*. This can be contrasted with the duty approach, which focuses on characterising the *substantive legal relationship between B and X* (category (a) above).

The liability approach has implicitly shifted from explaining the substantive legal relationship between B and X to defining the legal relationship between the court

³⁶ Chapter 2, Part C.3. See further: S Smith, 'Rights and Remedies: A Complex Relationship' (n33) 42.

and X. The liability approach explains the relationship between X *and the court* but, critically, it does not identify *the substantive legal relationship* to which X's liability to court orders gives effect. Professor Smith has described X's liability to court orders as being 'free-standing',³⁷ in the sense that X's liability does not arise in response to a wrong that is a breach by X of an antecedent duty. While this explains what the substantive legal relationship *is not*, Professor Smith, and other proponents of the liability approach, have not positively identified what *is* the substantive legal relationship that X's liability to court orders gives effect.

iv. Implication for this thesis

The implication for this thesis is that the thesis' adoption of the liability approach to understand X's responsibility has, thus, raised a further analytical gap not previously identified by the proponents of the liability approach. That gap relates to the *substantive legal relationship* that arises in response to the event of non-compliant execution, and to which X's liability to court orders gives effect. This raises two potential lines of inquiry. The *first* is whether action-based rights and duties, including X's liability to court orders, can be freestanding in the sense that they relate to no substantive legal relationship at all. This issue is beyond resolution in this thesis. Accepting for now that action-based rights presume the existence of, and give effect to, substantive legal relations, the liability approach presumes, but fails to articulate, the existence and nature of the substantive legal relationship to which X's liability gives effect.

This thesis' adoption of the liability approach thus raises a *second* line of inquiry as to the substantive legal relationship to which X's liability gives effect; this is considered next.

v. The substantive legal relationship between X and B to which X's liability gives effect

It is submitted that the best way of understanding the substantive legal relationship to which X's liability gives effect is in terms of a disability-immunity relationship between T/D and B. That is, X is liable to court orders requiring X to exercise her

³⁷ S Smith, 'A Duty to Make Restitution' (n3) 176. See also: N McBride, *The Humanity of Private Law* (n3) 62–63.

powers over subject property as necessary either to give effect to, or so that it is as if there was, a disability-immunity relationship between T/D and B. This disability-immunity relationship between T/D and B was discussed in Chapters 3³⁸ and 4.³⁹ In summary, the analysis in those Chapters demonstrates that the event of a non-compliant execution results in a disability-immunity relationship arising between T/D and B in two ways, depending on the type of powers involved.

First, powers created under an express trust are *disabled* by non-compliance with equity's standards, and B's interest against T is *immune* from a non-compliant exercise. This is because the scope of these powers is confined by compliance with equity's standards. A non-compliant exercise of a power created by an express trust, such as a power of appointment, is ineffective to vary the trust terms and does not change the parties' rights and obligations as defined by those terms, including B's interest against T. As discussed in Chapter 4,⁴⁰ the beneficiary's proprietary claim asserts B's equity for relief necessary to give effect to this disability-immunity relationship, such as declaratory relief. This is shown by *Cloutte v Storey*, where X's liability is to court orders necessary to give effect to the disability-immunity relationship between D and B.⁴¹

The *second* way in which the event of a non-compliant execution can be understood as giving rise to a disability-immunity relationship relates to T's powers held as an incident of her title to trust property. These powers are *not* disabled by non-compliance with equity's standards, and B's interest against T is not immune from exercise of T's powers held as an incident of her title to trust property. This is shown by cases like *Foskett v McKeown*⁴² and *Gadson v Gadson*,⁴³ where the non-compliant execution was effective. X did receive title to the trust property and B's interest against T was changed because T no longer had title to the trust property. Thus, it is not possible to say that equity's standards imposed an actual disability-immunity relationship between T/D and B. Further, we *cannot* understand X's

³⁸ Chapter 3, Part E.1.iii.

³⁹ Chapter 4, Part D.1.i.

⁴⁰ Chapter 4, Part D.4.

⁴¹ *Cloutte v Storey* [1911] 1 Ch 18.

⁴² *Foskett v McKeown* [2001] 1 AC 102.

⁴³ *Gadson v Gadson* [2003] WASC 48.

liability as being to court orders requiring X to exercise her powers over trust property necessary *to give effect* to a disability-immunity relationship.

Nonetheless, the concept of the disability-immunity relationship remains relevant to understanding X's liability, having regard to the effect of relief in response to the beneficiary's proprietary claim. Where there is a non-compliant exercise by T of her powers held as an incident of title, as in cases like *Foskett v McKeown* and *Gadson v Gadson*, the best that equity can do is to recognise an equity for relief, so that it is *as if* T had been disabled by, and *as if* B's interest against T was immune from, the non-compliant execution. In *Foskett* this meant that X was required to pay the value of property. In *Gadson*, X was required to transfer title to the subject property. Once relief is complied with, in both cases it is possible to say that the effect of relief is to place B in the position *as if* her interest had been immune from the non-compliant execution, and *as if* T had been disabled.

Thus, to the extent that it is necessary to identify the substantive legal relationship to which X's liability gives effect, it is submitted that it is a disability-immunity relationship between T/D and B that arises in response to the event of a non-compliant execution. This relationship may not always actually exist in the strict Hohfeldian sense, as a limit on the scope of power, in the second case of T's powers held incident of title. Nonetheless, B's equity and X's liability are defined by reference to a disability-immunity relationship, as each reflects what is necessary either to give effect to, or so that it is as if there was, a disability-immunity relationship between T/D and B.

Observe that, on this thesis' account, X is affected by a substantive legal relationship to which X is *not* a party via her liability to court orders in response to B's claim. This is an important effect of the claim, as this essentially allows B to transfer the risk of a non-compliant execution to X. This thesis will return to this feature and justification in Chapter 9. Discussed next is the condition for X's responsibility.

D. Condition for X's liability

Three arguments are made in this Part D regarding the condition for X's responsibility: *first*, the condition for X's responsibility is her *retention* of the *subject property*, which includes traceable substitutes; *second*, X's responsibility is *not*

conditioned upon X's interference with B's proprietary rights; and *third*, X's responsibility is not conditioned upon B first exhausting any claims against T.

The arguments in this Part D will proceed in the following way. Part D.1 will explain what is meant by retention. Part D.2 will show that X's responsibility is conditioned upon retention of the *subject property*. Part D.3 will consider the implications arising from extension of the claim to traceable substitutes. Part D.4 will demonstrate that X's responsibility is not conditioned on X's interference with B's proprietary rights. Part D.5 will observe that X's responsibility is not conditioned upon B first exhausting any claims against T. Part E will complete this thesis' account of the condition for X's responsibility by showing that X's responsibility is strict and is not dependent upon her knowledge.

1. Retention

The condition for X's responsibility is her *retention* of the subject property. Retention refers to X having some right or power over the subject property. X's responsibility is sometimes described as being conditional upon X 'hold[ing]'⁴⁴ specific property. This concept can be imprecise where the property cannot be physically held or possessed. The beneficiary's proprietary claim can be made in relation to any form of property that can be the subject of an express trust, including title to tangible things like chattels or real property, and intangible property, such as a chose in action (eg rights under a contract, or a debt).⁴⁵ Another problem with the concept of 'holding' is that the subject property might be a power such as the power to transfer title to property or vote shares in a company. Further, and in relation to intangible property, such as a chose in action, it is difficult to say that X has or *holds* this property.

⁴⁴ *Foskett* (n42) 108–09 (Lord Browne-Wilkinson).

⁴⁵ As in *Foskett* (n42). Some property scholars reject the idea that all these forms of 'property' should be understood as *property* sufficient to attract certain protections for other forms of property, see eg: S Douglas and B McFarlane, 'Defining Property Rights' in J Penner and H Smith (eds), *Philosophical Foundations of Property Law* (OUP 2013) 219. Irrespective of that debate, these rights have been understood as 'property' in the sense that they can be the subject of an express trust and the beneficiary's proprietary claim: *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, 124 (Lord Shaw); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 [1523]–[1547].

A more precise concept is X's retention of a right and/or power over the subject property, for example where X has title to that property. X's rights and powers in relation to the subject property are sufficient for X's responsibility to the beneficiary's proprietary claim. This is evident from cases⁴⁶ in which X does not physically have or hold specific property, but does have a legal or equitable right or power over the subject property, such as title to a chose in action (for example, a debt owed by a bank), or an equitable interest, or a mortgagee's power of sale over the subject property. This thesis uses the concept of *retention* to refer to this condition that X has rights and/or powers in relation to the subject property.

Retention should be distinguished from *receipt*, the latter concept referring to the fact that X at one point in time did acquire some right or power over the subject property. Receipt is a necessary condition for retention, but X will not be responsible to B's claim on the basis of receipt alone. As much is summarised by Lewinson J in *Ultraframe (UK) Ltd v Fielding*:

The proprietary remedy *does* depend on receipt. If the defendant has not received the claimant's property at all (or any identifiable substitute for it), then it is clear that the proprietary remedy will not lie against him. Equally, it depends on retention. If the defendant no longer has the property (or its substitute), the proprietary remedy is defeated.⁴⁷

After receipt, X may have disposed of, consumed or dissipated the subject property; if so, X's responsibility is extinguished. For X to be responsible to meet B's claim, X must retain the subject property at the time orders for relief are made. This is demonstrated by *Re Montagu's Settlement Trusts*, where X's liability to the claim depended on her retention of the subject property *at the time orders for relief were made*.⁴⁸ That case was discussed in Part C.2.ii above, where it was observed that Megarry VC expressly recognised the point that X will have no responsibility if X does not retain the subject property at the time orders for relief are made.⁴⁹ What counts as the subject property is considered next.

⁴⁶ As in: *Strang v Owens* (1925) 42 WN (NSW) 183; *Dudley v Champion* [1893] 1 Ch 101; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862; *Foskett* (n42); *Roadchef (Employee Benefits Trustees Ltd) v Hill* [2014] EWHC 109.

⁴⁷ *Ultraframe* (n45) [1519].

⁴⁸ *Re Montagu's Settlement Trusts* (n12).

⁴⁹ *Re Montagu's Settlement Trusts* (n12) 271.

2. The subject property

X's responsibility depends upon her retention of the *subject property*, which requires B to show that X retains, in the sense of having a right or power over, either of: (i) the property that was originally the subject of the non-compliant execution ('the original property'); or (ii) property which B can show is the traceable substitute of the original property ('the traceable substitute'). These categories are discussed next, as well as the processes for their identification.

i. Original or traceable substitute

Chapter 4⁵⁰ examined the cases demonstrating the availability of the claim where X retains the original property, such as *Gadson v Gadson*, where B's claim related to title to land originally held on trust and transferred to X,⁵¹ and *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*, where B's claim related to title to shares originally held on trust and transferred to X.⁵²

Chapter 4 also discussed cases such as *Strang v Owens*⁵³ and *Foskett v McKeown*⁵⁴ which demonstrate the availability of the claim where X retains property that can be identified as the traceable substitute of the original trust property.

ii. Following and tracing

The original property and the traceable substitute are identified through two distinct processes. *Tracing* refers to the process of identifying one form of property as the traceable substitute of another form of property.⁵⁵ Tracing is distinct from *following*. Where the trust property has not changed form, the specific property will be followed from the trustee to X, as in *Gadson v Gadson*⁵⁶ and *Macmillan Inc*

⁵⁰ Chapter 4, Part D.1.

⁵¹ *Gadson* (n43). See also: *Futter v Toohey* (1897) 2 SCR (NS) (NSW) Eq 20, where B successfully sought recovery of the original trust property.

⁵² *Macmillan* (n28).

⁵³ *Strang* (n46).

⁵⁴ *Foskett* (n42).

⁵⁵ *Foskett* (n42) 109 (Lord Browne-Wilkinson), 127–29 (Lord Millett); *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75 [133] (Spigelman CJ; Handley JA and Santow JA agreeing); L Smith, *The Law of Tracing* (Clarendon Press 1997).

⁵⁶ *Gadson* (n43).

v Bishopsgate Investment Trust plc (No 3),⁵⁷ where B followed the trust property from T to X.

However, in cases like *Strang v Owens* and *Foskett v McKeown*, the process of tracing is needed to identify X as retaining the subject property. In *Foskett*, for example, the original trust property was in the form of a debt owed by a bank to T.⁵⁸ X did not acquire or retain this property. Rather, the property retained by X at the time of trial, and subject to court orders, was another chose in action constituted by a different bank account into which the proceeds from a policy of life insurance had been deposited. This second chose in action could be identified as the traceable substitute of the original, as the trust funds were applied towards payment of some of the premiums on the life insurance.

It is necessary to acknowledge that there is uncertainty about the mechanics of tracing, for example whether tracing identifies exchanges in value through a series of transactions that are sufficiently connected, or identifies exchanges of rights via transactional links.⁵⁹ The outcome of this debate is important to understanding whether X retains the subject property and is liable to B's claim. Whatever is the truth about the *process* of tracing, this thesis is concerned with one of the *claims* which may be facilitated by that process. The position taken in this thesis is that the uncertainties concerning the process of tracing cannot be resolved until the underlying claim(s) facilitated by tracing are properly understood.⁶⁰

Nonetheless, the extension of the beneficiary's proprietary claim to the traceable substitute does have significant justificatory implications which will be addressed in Chapter 9. Part D.3 next outlines the implications of the extension to traceable

⁵⁷ *Macmillan* (n28).

⁵⁸ *Foskett* (n42).

⁵⁹ About which divergent views are expressed in the cases and academic literature, a small sample including: *Foskett* (n42) 128–33; *Relfo Ltd v Varsani* [2014] EWCA Civ 360 [60]; *Brazil v Durant International Corp* [2015] UKPC 35 [40]; L Smith, *The Law of Tracing* (n55); M Conaglen, 'Difficulties with Tracing Backwards' (2011) 127 LQR 432; T Cutts, 'Tracing, Value and Transactions' (2016) 79 MLR 381; J Edelman, 'Understanding Tracing Rules' (2016) 16 QUTLR 1; A Nair, *Claims to Traceable Proceeds* (OUP 2018).

⁶⁰ As recognised in Cutts (n59) 397.

substitutes for the condition for X's responsibility, and the nature of B's corresponding interest as asserted by the beneficiary's proprietary claim.

3. Implications of extension to the traceable substitute

The discussion in this Part D.3 will show that the extension of the beneficiary's proprietary claim to traceable substitutes may sometimes present B with a choice as to *who* may be responsible for satisfying B's equity for relief. B can choose to claim against the person with the original property or the person with the traceable substitute. It is not possible for B to claim against all potential targets at once; B must make a choice.⁶¹

It will be argued that the existence of this choice means that B should be understood as having a power to choose who is responsible to B's claim, so that the event of non-compliant execution gives rise to a *composite of multiple legal relations*. One aspect (set out earlier in Part C) is X's liability to court orders requiring X to exercise her powers as necessary to give effect to, or so that it is as if there was, a disability-immunity relationship between T/D and B. The other and conceptually preliminary legal relationship, discussed now, is *B's power* to choose *who* will be subject to a liability to court orders. The existence of this power, and the condition for X's liability for its exercise, will be discussed in Part D.3.i next. Its analytical implications for B's interest are dealt with in Part D.3.ii below.

i. Existence and scope of B's power and X's liability

B's choice exists where there is more than one legal person who can be identified as retaining the subject property, whether it be the property originally subject to the non-compliant execution or its traceable substitutes. The existence of this choice depends on the dealings with the subject property. Where there have been successive exchange dealings with the original property, B may be presented with a choice in relation to the identity of the party against whom she can assert her claim. If the original property can be followed, and there are one or more traceable substitutes, then there are multiple legal actors who can be identified as retaining

⁶¹ *Re Hallett's Estate* (1880) 13 Ch D 696, 709–11 (Jessel MR). The existence of this choice is recognised in *Foskett* (n42) 127 (Lord Millett); McGhee J (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) [30-055]; P Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 315.

the subject property. All are potential targets. B can choose, for example, whether to claim against X_1 or X_2 and so on. This potential for 'geometric multiplication'⁶² has been identified before.

Having regard to this choice, B has a *power* to choose who will be responsible for satisfying B's equity for relief and is liable to court orders, and X (anyone who is identified as retaining the original or traceable substitute) has a correlative *liability* to B's exercise of power. X's liability to B's power is separate to X's subsequent liability to the court's power to order X to satisfy B's equity for relief.

Depending on the facts, sometimes B will have no choice as against whom she will exercise her power, or the options may be limited, depending on what dealings have occurred. For example, if the original trust property is destroyed or consumed or cannot be followed, and if there is only one substitution, B will have no choice in relation to which specific form of property B asserts her claim against.

It is important to distinguish B's power from the power any plaintiff has to decide whether to commence legal proceedings and seek court orders to give effect to a given substantive legal relationship between a plaintiff and defendant. The difference is that B's power to pursue X_1 or X_2 in relation to the original or traceable substitutes *changes the legal relations between the parties*. B's power allows her to choose the legal actor who will be responsible for the beneficiary's proprietary claim. B can choose whether it will be X_1 or X_2 , for example. By contrast, a plaintiff's act, or power, in commencing proceedings has only a *causative* effect.⁶³ The plaintiff's choice cannot change the substantive legal relations between the plaintiff and defendant. For example, the plaintiff has no choice as to *who* is subject to that legal relationship and is the proper defendant to the plaintiff's claim.

The final implication is that the existence of B's power to impose liability upon the person who has the original or traceable substitute may, depending on the facts, have the effect of preserving property available to satisfy B's claim. If B's claim was confined to the original property, her claim may be less likely to succeed, as it would be dependent upon the original property being capable of being followed. Further,

⁶² See eg: P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989) 393–94; L Smith, *The Law of Tracing* (n55) 358–59; L Smith, 'Tracing' in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 134–35.

⁶³ In relation to the distinction between legal powers and causative powers, see n32.

if the beneficiary's proprietary claim was confined to the original property, the claim would not be available in those cases, such as *Foskett v McKeown* and *Strang v Owens*, where T transfers trust funds held in a bank account, which necessarily involves substitutions in the form of property. As observed by Professor Worthington, the overall effect of B's power is to 'amplify'⁶⁴ the protection afforded to B; the significance of this observation will be discussed further in Chapter 9.

ii. Inchoate nature of B's interest

B's power to choose the legal actor who will be responsible for the beneficiary's proprietary claim means that B's interest which is asserted by the beneficiary's proprietary claim has an inchoate nature.⁶⁵ This is because prior to exercise of B's power, it is not possible to say *who*, and *what* specific property is subject to B's interest. Recall, when the facts are such that B has a choice whether to assert her claim against X₁ or X₂ etc, prior to B's election, B cannot be the owner of all potential targets at once. B must elect. Unless and until B makes this election, it is not possible to characterise B's interest as being affixed to one legal person or another.

The inchoate nature of B's interest has triggered debate over the priority and timing of B's interest, largely in relation to the traceable substitute(s). This issue will be of practical significance if X dies, goes insolvent or bankrupt, or creates further interests in the subject property, for example grants an equitable mortgage or charge. It is important to be sure about the priority of B's interest as asserted by the claim as this is an important foundation for this thesis' arguments concerning the function of the claim in Chapter 9, and for this thesis' distinction between the beneficiary's proprietary claim and other proprietary claims in Chapter 9.

The priority implications of the inchoate nature of B's interest have been considered by others before. Professor Birks argued that B's interest in the traceable substitute can be analogised with a plaintiff's power to rescind.⁶⁶ According to this view, the plaintiff's equity for rescission and B's interest in the traceable substitute are not fully vested equitable interests prior to exercise of the

⁶⁴ S Worthington, *Equity* (2nd edn, OUP 2006) ch 4.

⁶⁵ As recognised in: P Birks, 'Overview' in P Birks, *Laundering and Tracing* (Clarendon Press 1995) 307–11; D Fox, 'Overreaching' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 101–05; Millett (n61) 315.

⁶⁶ Birks, 'Overview' (n65) 307–11.

power. On Birks' model, B's interest in relation to traceable substitutes would be a mere equity and rank *behind* later equitable assignees who provide value and act in good faith.

The contrary argument has been made: that B's interest takes priority, as an equitable interest equivalent to B's equitable interest vis-à-vis the original property, from the date when X acquires title to the subject property.⁶⁷ B's equitable interest would take at least default priority over later equitable interests, and priority over later mere equities,⁶⁸ and have priority in the case of X's death and insolvency/bankruptcy.⁶⁹

This debate over the nature of B's interest in relation to the traceable substitute has largely focused on two cases, *Cave v Cave*,⁷⁰ and *Re French's Estate*,⁷¹ and their different interpretations. *Cave v Cave* is acknowledged by both sides to support the view that B's interest will rank as an equitable interest prior to the date of election, so that any traceable substitute will be treated as if it had been subject to that choice from the point of substitution.

However, there is the case of *Re French's Estate*, which was relied upon by Professor Birks⁷² to characterise B's interest as a mere equity. But with respect, it is submitted, having regard to the majority reasoning of FitzGibbon and Barry LJ⁷³ in *Re French's Estate*, that this case is best understood as turning upon the application of laches and estoppel to bar B's claim rather than the priority of B's interest.⁷⁴

In addition, it is submitted that there is a seam of cases that support the view that B's interest in relation to the traceable substitute arises from the point of

⁶⁷ See eg: L Smith, *The Law of Tracing* (n55) 356–61; Fox (n65) 96–105.

⁶⁸ *Rice v Rice* (1853) 2 Drew 73, 78; *Phillips v Phillips* (1861) 4 De G F & J 208, 215; *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, 277–79 (Kitto J), 291 (Menzies J); D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) [3.50].

⁶⁹ *Gadson* (n43); *Foskett* (n42) 127.

⁷⁰ *Cave v Cave* (1880) 15 Ch D 639.

⁷¹ *Re French's Estate* (1887) 21 LR (Ir) 283 (CA Ir).

⁷² Birks, 'Overview' (n65) 307.

⁷³ *Re French's Estate* (n71), see eg: 311, 312, 315, 336.

⁷⁴ The priority of B's interest was a key determinant only for Porter MR's decision in *Re French's Estate* (n71) 300.

substitution.⁷⁵ In all these cases, there is a non-compliant exercise of power by T/D, X₁ acquires an interest in the traceable substitute, and there is a subsequent equitable assignment by X₁ that results in a priority dispute between B's equitable interest and X₂. In all these cases, B is able to assert her equitable interest against X₂ as the later equitable assignee. This is so despite X₂ acquiring her equitable interest in the subject property *prior* to the date of B's election.

The significance of this seam of cases is that they show that B's interest in the traceable substitute is treated as an equitable interest and not as a mere equity. *If* B's interest were a mere equity, then the outcome of these cases would have been different, and X₂, as the good faith purchaser of an equitable interest, would have succeeded. The cases can thus be added to *Cave v Cave*, and support this thesis' argument that B's interest, despite its inchoate nature, ranks as an equitable interest for the purposes of equitable priority rules. These cases also show that B's interest dates retrospectively from the date of X's acquisition of title to the subject property, and not from the date of X's election. This means that B's interest against X has priority over X's assignees and creditors, and this priority dates from when X acquires the subject property.

Finally, this retrospectivity coupled with X's strict responsibility, discussed next in Part E, makes it even more important to address a contrary argument that X's responsibility to B's claim should be conditioned upon knowledge, which is the aim of Part E below.

4. X's liability is not conditioned on X's wrongful or 'non-wrongful' interference with B's proprietary rights

The next point made in this Part D is to show that X's interference with B's proprietary rights is not a condition for X's responsibility. This is necessitated by the arguments made by other scholars that a condition for X's responsibility is interference with B's proprietary rights. For example, X's responsibility has been

⁷⁵ See eg: *Perpetual Trustee Co Ltd v Cowan (No 2)* (1900) 21 LR (NSW) Eq 278; *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84; *Daubeny v Cockburn* (1816) 1 Mer 626; *Cory v Eyre* (1863) 1 De GJ & S 149; *Shropshire Union v R* (1865) LR 7 HL 496; *Capell v Winter* [1907] 2 Ch 376, 382–83 (Parker J); *Cloutte* (n41). See also: *Underhill & Hayton* (n11) [28.6].

understood to arise in response to X's infringement of B's right of non-interference.⁷⁶ Alternatively, Professor Lionel Smith has argued that X is not subject to a duty of non-interference, but rather is required to not interfere with B's equitable title.⁷⁷ The consequence is that X's interference is 'non-wrongful'. It is this non-wrongful infringement or interference with B's proprietary interest that triggers X's responsibility.

There is divergence among these accounts over whether the relevant event triggering X's responsibility is a wrong or not. However, it is not necessary to resolve this divergence because there is a flaw common to these views, which is that X's responsibility is conditioned upon X's interference with *B's proprietary rights*. The problems with this approach were discussed in Chapter 2, and relying on those arguments, it is submitted that the flaw is that the argument is circular. B can only be understood to have a proprietary right by assuming the existence of the beneficiary's proprietary claim. Thus, the proprietary nature of B's right cannot be used as a source of reason to understand the claim itself, and the legal relations it gives effect to. On this basis, X's responsibility should not be understood as conditioned upon X's interference, wrongful or not, with B's 'proprietary rights'.

5. X's responsibility is not conditioned upon B first exhausting any claims against T

When there is a non-compliant execution, there is potentially a range of personal and proprietary claims available against T. B could,⁷⁸ for example, choose to adopt the non-compliant execution, the effect of which is that the property acquired by T in substitute for the original trust property forms part of the trust estate.⁷⁹ Alternatively, B could claim equitable compensation against T as the monetary

⁷⁶ Nolan (n4) 236–39, 253–62.

⁷⁷ L Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412, 420–23, 435–36; L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas L Rev 2115, 2127, 2159; L Smith, 'Transfers', in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 136; L Smith, 'Unravelling Proprietary Restitution' (2004) 40 CBLJ 317, 321–29. See also: R Grantham and C Rickett, 'Property Rights as a Legally Significant Event' (2003) 62 CLJ 717, 732–35.

⁷⁸ If absolutely entitled and sui juris, or in the case of multiple beneficiaries, if all consent to adoption.

⁷⁹ As explained in *Foskett* (n42) 130 (Lord Millett). See further: Fox (n65) 104–08.

substitute for T's duty to restore the property originally subject to the non-compliant execution.⁸⁰

The key observation is that the beneficiary's proprietary claim against X is not conditioned on B first exhausting her potential claims against T.⁸¹ B can choose whether to pursue T or X. X's responsibility is not subsidiary or contingent upon B's claims against T.

Pausing here, it is acknowledged that this observation agitates a potential misalignment between express trusts and deceased estates. In the context of a deceased estate, the *personal* claim for restitution of the value of property against a third-party recipient is restricted to the claimant first exhausting her claims against the executor.⁸² There are outstanding questions⁸³ about this restriction, and this thesis' interpretation of *Re Diplock* as concerning a statutory trust rather than a deceased estate⁸⁴ further agitates some of these issues. However, they are beyond resolution in this thesis, which is concerned with the beneficiary's proprietary claim in relation to an express trust, and not with the personal claim for restitution of the value of property against a third-party recipient. We will however, return to the recovery regime for property misapplied from deceased estates in Chapter 9.

E. X's strict responsibility and role of conscience in equity

To complete this thesis' account of the conditions for X's responsibility, it is necessary to show that X's knowledge is not a relevant condition, and thus X's

⁸⁰ As in: *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 [30]–[32] (the Court).

⁸¹ As recognised in: *Hagan v Waterhouse* (1991) 34 NSWLR 308, 369–70; *Underhill & Hayton* (n11) [99.40].

⁸² *Re Diplock* [1948] Ch 465, 503–04 (the Court), *affd* on appeal in *Ministry of Health v Simpson* [1951] AC 251.

⁸³ See eg: C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [8-120]–[8-126]; L Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (n77); T Akkouch and S Worthington, 'Re Diplock' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart Publishing 2006) ch 11.

⁸⁴ Chapter 4, Part B.

responsibility in this sense is strict. It is important to acknowledge that against this thesis' position are some judicial statements and academic arguments that X's responsibility is conditional upon knowledge. For example, Professor Ben McFarlane and Dr Sinéad Agnew have argued that the requirement for X's knowledge is dictated by the role of conscience in equity, and the moral imperative that X should not be required to perform a duty without knowledge of the facts necessary for moral reasoning.⁸⁵

The aim of this Part E is to set out the reasons why this thesis takes the contrary view that X's responsibility is *not* conditioned upon knowledge. The argument will proceed as follows. Part E.1 will explain how the cases support this thesis' argument that X's responsibility is strict and not conditional upon her knowledge. Part E.2 will address the cases considered to support the contrary position. Part E.3 will explain how X's strict responsibility can be reconciled with the role of conscience in equity and the moral imperative for knowledge.

By way of ground clearing, it should first be explained that there is uncertainty about the level or standard of knowledge in determining third-party liability. Australian law⁸⁶ has so far maintained the five levels⁸⁷ of knowledge and notice for knowing receipt, as compared with English law, which has forged a different path relying on 'unconscionability'.⁸⁸ This thesis does not need to resolve this uncertainty. Irrespective of the outcome, knowledge (as that label is used to encompass the levels of knowledge through to notice) is not a condition for X's liability. Considered next is the case evidence demonstrating this point.

⁸⁵ Agnew and McFarlane (n4) 306–10, 313–14.

⁸⁶ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [177]; *Grimaldi* (n28) [268]–[269]; J Dietrich and P Ridge, *Accessories in Private Law* (CUP 2016) ch 8.

⁸⁷ These are: (i) 'actual' knowledge; (ii) the wilful shutting of eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (v) knowledge of circumstances which would put an honest reasonable man on inquiry: *Baden v Société Générale Favouriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, 575–76 (Peter Gibson J).

⁸⁸ See *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 448, 455 (Nourse LJ), considered in *Criterion Properties plc v Stratford UK Properties LLC* [2002] EWCA Civ 1783 [28]–[40], affd on other grounds on appeal [2004] 1 WLR 1846. See further: *Underhill & Hayton* (n11) [98.31]–[98.32].

1. X's responsibility is strict

In summary, there are two patterns in the case evidence that demonstrate that X's responsibility is strict in the sense that it is not conditional upon X's level of knowledge: (i) B does not need to plead or prove X's knowledge; and (ii) B's equitable interest and its priority may pre-date X's knowledge.

i. B does not need to plead or prove notice or knowledge

The first pattern is demonstrated by the cases that describe the elements for the beneficiary's proprietary claim, and do *not* include X's knowledge as a factor.⁸⁹ This point is further demonstrated by cases where an express finding was made as to the lack of X's knowledge, yet *the beneficiary's proprietary claim was available*.⁹⁰ A clear example is *Krnjulac v Lincu*,⁹¹ which was mentioned above. In this case there was a non-compliant transfer of title to trust property to X, who was ordered to re-convey that title to the trustees of the charitable trust.⁹² What is significant about this case is that Bathurst CJ expressly observed on appeal that *B did not plead or prove X's knowledge of B's claim*.⁹³ This observation was made in the context of explaining why the trial judge's orders based on X being a knowing recipient should

⁸⁹ *Strang* (n46) 184 (Street CJ; Owen and Long Innes JJ agreeing), special leave to appeal to the High Court of Australia refused *Owens v Strang* (1925) 37 CLR 593 (Knox CJ, Issacs, Higgins, Rich and Starke JJ); *Re Montagu's Settlement Trusts* (n12) 271–72, 276–78 (Megarry VC); *Foskett* (n42) 108 (Lord Browne-Wilkinson), 112 (Lord Steyn), 117 (Lord Hope), 127 (Lord Millett); *Ultraframe* (n45) [1518]–[1522] (Lewison J). Academic opinion comes to a similar conclusion, see eg: *Underhill & Hayton* (n11) [99.13]–[99.14], [99.39]; L Tucker, N Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) [41-045]; C Harpum, 'The Stranger as Constructive Trustee' (1986) 102 LQR 114, 126; P Birks, 'Receipt' in P Birks and A Pretto, *Breach of Trust* (Hart Publishing 2002) 216; Mitchell and Watterson (n11) 115–17; J Heydon and M Leeming, *Jacobs' Law of Trusts in Australia* (8th edn, LexisNexis 2016) [27-13]; Swadling (n31) 309.

⁹⁰ Megarry VC in *Re Montagu's Settlement Trusts* (n12) 271–72 acknowledged the in-principle availability of the beneficiary's proprietary claim, despite the innocence of the recipient.

⁹¹ *Krnjulac* (n13).

⁹² *Krnjulac* (n13) [24].

⁹³ *Krnjulac* (n13) [2]–[6], [18] (Leeming LJ agreeing). Note that the property in question was land, and the question of indefeasibility of title to land under s 42 of the Real Property Act 1900 (NSW) was not raised. This defence will be considered in Chapter 8.

be set aside. Relief on the basis of the beneficiary’s proprietary claim was upheld on appeal.⁹⁴

There are more cases where the beneficiary’s proprietary claim was successful or recognised as available, despite the express finding that X did *not* have knowledge, including where B was able to assert priority of her equitable interest against a latter *innocent* and *bona fide* equitable assignee.⁹⁵ It is submitted that these cases, like *Krnjulac v Lincu*, clearly demonstrate that X’s liability is not contingent upon her level of knowledge.

Further, it is X who bears the onus of proving the *absence* of notice if she is to raise the plea of bona fide purchaser.⁹⁶ If knowledge or notice were an element of the beneficiary’s proprietary claim, then it would be for B to plead and prove the notice/knowledge of the party against whom the claim is asserted, X. It would thus not be necessary for X to bear the burden of proof to show the absence of notice. X would only need to adduce evidence to counter B’s evidence and prevent B from discharging B’s evidential burden. However, this is not the case.

ii. Equitable interest arises before acquisition of notice/knowledge

The second pattern in support of this thesis’ argument that X’s responsibility is not conditioned upon knowledge is that the interest or equity asserted by B’s claim arises before X acquires knowledge or notice. If, contrary to the argument advanced here, X’s liability was contingent upon X’s knowledge, then the equitable interest or title asserted by the claim would not arise until the point at which X has the

⁹⁴ *Krnjulac* (n13) [24].

⁹⁵ See eg: *Crow v Campbell* (1884) 10 VLR (Eq) 186, 193–95 (Molesworth J) (note that this case is reported in the headnote as a suit for administration, however it has been included in this thesis as evidence of the beneficiary’s proprietary claim in relation to the express (testamentary) trust that arose upon the completion of the administration of the deceased estate); *Cory* (n75) 163–64 (Knight Bruce LJ), 167–69 (Turner LJ); *Shropshire Union* (n75); *Capell* (n75) 381–83 (Parker J); *Powell v London & Provincial Bank* [1893] 1 Ch 610, 616–17 (Wright J), *affd* on appeal [1893] 2 Ch 555, 564 (Kay LJ).

⁹⁶ *Pilcher v Rawlins* (1872) LR 7 Ch App 259, 269 (James LJ); *Independent Trustee Services* (n11) [86] (Lloyd LJ). This point is also made in: M Bryan, ‘Recipient Liability under the Torrens System: Some Category Errors’ in C Rickett and R Grantham (eds), *Structure and Justification in Private Law* (Hart Publishing 2008) 344, 351.

requisite level of notice/knowledge.⁹⁷ However, and as discussed in more detail above in Part D.3.ii, the case law demonstrates that B’s interest arises before, and is thus irrespective of, X’s knowledge.

2. Accounting for contrary cases

There are three cases that might tend against this thesis’ argument, and which have been relied upon to support the contrary argument that knowledge *is* a requirement for the beneficiary’s proprietary claim.⁹⁸ Set out now are the reasons why each case does not support the position that the beneficiary’s proprietary claim is dependent upon X’s knowledge.

i. *Re Loftus*

In the first case, *Re Loftus*, Lawrence Collins J stated that the ‘test for knowledge was substantially the same’ whether the claim was a claim of knowing receipt or a proprietary claim.⁹⁹ However, this statement was limited to ‘*the circumstances of this case*’,¹⁰⁰ and having regard to which, it did not matter whether knowledge was a requirement for the beneficiary’s proprietary claim. X had already been found to have knowledge satisfying knowing receipt.¹⁰¹

ii. *Papadimitriou v Crédit Agricole Corp*

The second case is *Papadimitriou v Crédit Agricole Corp & Investment Bank*, where Lord Sumption stated that ‘what constitutes notice or knowledge is the same’ in the context of assessing whether a defendant can make out a plea of bona fide purchaser or was liable to a claim in knowing receipt.¹⁰² This statement was directed towards the *content* of the defendant’s knowledge for the purposes of knowing

⁹⁷ As is the case with the priority of equitable title in relation to the constructive trust that arises from the point at which the recipient of a mistaken payment has the requisite knowledge: *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 715 (Lord Browne-Wilkinson); *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589 [42]–[44] (White J).

⁹⁸ Agnew and McFarlane (n4) 308–10.

⁹⁹ *Re Loftus* [2005] EWHC 406 [177].

¹⁰⁰ *Re Loftus* (n99) [177] (emphasis added).

¹⁰¹ *Re Loftus* (n99) [177].

¹⁰² *Papadimitriou v Crédit Agricole Corp & Investment Bank* [2015] UKPC 13 [33] (Lord Sumption).

receipt, and the plea of bona fide purchaser.¹⁰³ Lord Sumption’s comments should not be understood as meaning that knowledge (including notice) is a requirement for the beneficiary’s proprietary claim. That the plea of bona fide purchaser requires an absence of notice of the same facts of knowing receipt does not mean that the beneficiary’s proprietary claim is subject to knowledge.

iii. *Independent Trustee Services Ltd v GP Noble Trustees*

Lastly, there is Lloyd LJ’s statement in *Independent Trustee Services Ltd v GP Noble Trustees Ltd*, that B’s ‘proprietary claim’ ‘only extends to [property] ... in [X’s] ... hands at the time [X] ... was given notice’.¹⁰⁴ Read in isolation, this extract may tend against the view taken in this thesis, that X’s responsibility is not conditioned upon knowledge. However, Lloyd LJ’s statement occurred in a discussion that considered X’s liability to the beneficiary’s proprietary claim, *and* X’s liability as a constructive trustee as a knowing recipient. Lloyd LJ’s reference to notice should be understood as marking the time at which X is liable as *a knowing recipient* and not as marking the point at which B’s interest arose per the beneficiary’s proprietary claim. In support of this view is that Lloyd LJ went on to consider the¹⁰⁵ elements of the beneficiary’s proprietary claim, and X’s knowledge was not expressly mentioned.

Having regard to this thesis’ arguments made in relation to each case, it is submitted that these cases do not tend to the view that X’s responsibility to the beneficiary’s proprietary claim depends upon X’s knowledge. These cases thus do not undermine this thesis’ argument that X’s responsibility is strict.

3. Reconciling B’s interest and X’s responsibility with role of conscience in equity

This Part E.3 sets out this thesis’ argument that X’s strict responsibility does not engage the doctrinal and moral imperatives that require a duty to be conditioned upon knowledge. There are three reasons for this argument: (i) these imperatives are applicable to duties; (ii) these imperatives are not applicable to B’s claim; and

¹⁰³ See also: *Papadimitriou* (n102) [18]–[20] (Lord Clarke; Lord Sumption agreeing).

¹⁰⁴ *Independent Trustee Services* (n11) [76].

¹⁰⁵ *Independent Trustee Services* (n11) [85]–[101].

(iii) the role and meaning of conscience in equity does not necessarily undermine this thesis' argument.

i. Doctrinal and moral imperatives for knowledge are applicable to duties

As foreshadowed at the start of this Chapter, there are strong doctrinal¹⁰⁶ and moral imperatives¹⁰⁷ according to which X should not be subject to a duty without X having the knowledge required to comply with that duty. For example, Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* explained that:

the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience.¹⁰⁸

According to this view, X can only be subject to trustee duties if X has the requisite degree of knowledge. Added to this doctrinal position is the moral argument that a duty should not be imposed upon X unless X has knowledge of the material facts such that X can reason what to do.¹⁰⁹ This is on the basis that unless X has knowledge of the material facts, X will be unable to determine whether a duty applies and what is required to perform the duty.¹¹⁰

ii. These imperatives do not apply to B's claim

This thesis does not seek to challenge the moral imperative that X should not be required to perform a duty without X having the knowledge necessary to facilitate her fulfilment of that duty. Nor does this thesis challenge the doctrinal imperative in *Westdeutsche*, that knowledge is a pre-requisite for X to be held liable to account

¹⁰⁶ See eg: *Re Montagu's Settlement Trusts* (n12) 270–73 (Megarry VC); *Westdeutsche Landesbank Girozentrale* (n97) 705–06 (Lord Browne-Wilkinson); *Akers* (n20) [89] (Lord Sumption); *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2019] AC 271 [228] (Lord Mance).

¹⁰⁷ See further: S Smith, 'A Duty to Make Restitution' (n3); S Smith, 'Rights, Remedies and Causes of Action' (n3); Agnew (n3).

¹⁰⁸ *Westdeutsche Landesbank Girozentrale* (n97) 705.

¹⁰⁹ There may be other moral justifications for imposition of a duty, such as X's agreement or avoiding harm, but these are not relevant to the analysis whether X as an innocent third party should be responsible, see eg: S Smith, 'A Duty to Make Restitution?' (n3) 171–73.

¹¹⁰ S Smith, 'A Duty to Make Restitution?' (n3) 173.

as a constructive trustee, as that term is used to denote liability to account akin to an express trust, for example on the basis of knowing receipt.

What this thesis does take issue with is the assumption that these concerns are relevant to the beneficiary's proprietary claim and X's responsibility to satisfy B's equity for relief. This is on the basis that, for the reasons discussed above in Part C, the claim does not impose a duty on X to account as a constructive trustee, but instead a liability to court orders requiring X to exercise her power over trust property necessary to give effect to a disability-immunity relationship.

At the point at which orders are made against X, she will then be subject to a duty, but at that point X will be apprised of the facts needed to permit X's compliance with that duty. The procedural practicalities of litigation will typically ensure that X does have notice/knowledge of B's claim by the stage at which any orders for relief are made against X. For example, it is a fundamental requirement that B provide X with pleadings and particulars that set out the nature of the case that X has to answer¹¹¹ before a court will proceed to make orders against X.¹¹² Thus, at some time between lodgement of B's claim and the commencement of trial, X will have, at least, notice of B's claim. Thus, the consequence of the claim being conceived of as a liability, rather than a duty, is that the doctrinal and moral imperatives for X to have knowledge are met. Further, by the time X is subject to a duty to comply with court orders, she will be sufficiently apprised of the relevant facts to permit compliance with that duty.

iii. Role and meaning of conscience in equity

This Chapter's final argument relates to the assumption informing some previous academic arguments¹¹³ to the effect that X's responsibility should be conditioned upon knowledge. These contrary arguments are premised on the role of 'conscience' in equity, and in particular that equitable 'conscience' is confined to moral principles, including a requirement for a defendant to have the knowledge required to comply with a duty. The scope and meaning of equitable conscience are

¹¹¹ See eg: Uniform Civil Procedure Rules 2005 (NSW) pt 14 (form and requirements of pleadings), pt 15 (form and requirements of particulars).

¹¹² See eg: Uniform Civil Procedure Rules 2005 (NSW) pt 6 (no step in proceedings without originating process or notice of appearance), pt 10 (service of originating process).

¹¹³ Agnew (n3); Agnew and McFarlane (n4) 313–14.

beyond resolution in this thesis. It is submitted, however, that the invocation of conscience should not undermine the arguments in this Chapter for two reasons.

First, to the extent equitable conscience does demand that X have knowledge prior to being required to perform her duty, then for the reasons discussed above, this imperative is met on this thesis’ account of the form of X’s responsibility, which is a liability to court orders, not a duty.

Second, this thesis is sceptical of the starting premise by which equitable conscience is exclusively concerned with the defendant’s notice or knowledge. The concept of conscience in equity has been explored before.¹¹⁴ Relying on these previous explorations, ‘conscience’ should not be understood as a concept that is confined to the knowledge of the defendant. Rather, it should be understood as a concept that has evolved in its content and meaning and which encompasses a complex set of analyses relevant to the determination whether to award equitable relief against a particular defendant.

For example, ‘the invocation of the conscience of equity requires “a scrutiny of the exact relations established between the parties” to determine “the real justice of the case”’.¹¹⁵ According to this view, conscience ‘is a construct of values and standards against which the conduct of “suitors” – *not only defendants* – is to be judged’.¹¹⁶ There is further apex appellate court authority¹¹⁷ acknowledging that ‘conscience’ is not confined to the state of a defendant’s personal knowledge; rather, conscience is ‘a metaphorical term, designating the common standard of civil right and expediency combined’.¹¹⁸

¹¹⁴ In addition to the views discussed next, see also: I Samet, ‘What Conscience Can Do for Equity’ (2012) 3 *Jurisprudence* 13; I Samet, *Equity: Conscience Goes to Market* (OUP 2018); P Birks, ‘Equity, Conscience and Unjust Enrichment’ (1999) 23 *MULR* 1; P Keane, ‘The 2009 WA Lee Lecture in Equity: The Conscience of Equity’ (2010) 84 *ALJ* 92.

¹¹⁵ *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 [18], quoting *Jenyns v Public Curator* (1953) 90 CLR 113, 118–19.

¹¹⁶ *Kakavas* (n115) [16] (the Court) (emphasis added), referring to W Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Clarendon Press 1999) 44–51.

¹¹⁷ *Re Diplock* (n82) 488 (the Court).

¹¹⁸ J Pomeroy, *A Treatise on Equity Jurisprudence* (5th edn, Bancroft & Whitney Co 1941) vol 1, 74.

Professor McNair has also examined the historical evolution of the concept of conscience and its role in defining the basis for equitable intervention.¹¹⁹ According to McNair, conscience does not express a moral imperative that knowledge is a condition of X's liability. Rather, conscience defines the bounds of equitable jurisdiction in terms of matters that depend upon certain facts which could not be formally pleaded and proved by the parties in accordance with common law procedures prior to the judicature reforms.¹²⁰ McNair rejects the idea that 'conscience' refers to a defendant's subjective views of what is morally right, or a product of his moral reasoning as applied to certain facts.¹²¹

The implication is that conscience, as it is applied to justify equitable intervention, *is not* confined to the personal knowledge of the defendant; nor does it *necessarily* demand that liability to equitable relief depend upon the knowledge of the defendant. It is submitted that in light of this more nuanced understanding of conscience, X's strict responsibility does not present any paradox for the equitable genus of the beneficiary's proprietary claim.¹²²

F. Conclusion

This Chapter has examined the content, form and condition for X's responsibility to the beneficiary's proprietary claim. In relation to the *content* of X's responsibility, it has been argued that X is required to exercise her powers over the subject property so that it is as if the non-compliant execution had not occurred. That is, X is required to do what is necessary either to give effect to, or so that it is as if there was, a disability-immunity relationship between T/D and B. The *form* of X's responsibility should be understood as a *liability to court orders* requiring X to conform to the content of her responsibility: that is, to exercise her powers over the subject property as necessary either to give effect to, or so that it is as if there was, a disability-immunity relationship between T/D and B.

The *condition* for X's responsibility is X's retention of the subject property, which is the original property or the traceable substitute. X's interference with B's

¹¹⁹ M McNair, 'Equity and Conscience' (2007) 27 OJLS 659.

¹²⁰ McNair (n119) 675–77.

¹²¹ McNair (n119) 676.

¹²² Contra: Agnew and McFarlane (n4) 303.

proprietary rights is not a condition, and neither is X’s level of knowledge. The extension of the claim to the traceable substitute(s) has significant implications for understanding the operation and effect of the claim and the inchoate nature of B’s interest. These implications will require further consideration and justification in Chapter 9.

The final challenge has been to reconcile this Chapter’s account of X’s strict responsibility with the equitable genus of the claim, and the imperative that knowledge should be a requirement prior to imposition of a duty. This thesis’ reconciliation is on the basis that X is subject to a *liability* to court orders, rather than a *duty*. At the time when X was subject to a duty to comply with court orders (the time of judgment), she would have the knowledge needed to permit performance of that duty. Thus, the imperative for knowledge either does not apply, or is satisfied.

Chapter 7 – Who can assert the beneficiary's proprietary claim?

A. Introduction

This Chapter considers the identity of the party to whom the equity for relief asserted by the beneficiary's proprietary claim accrues, and whether that claim depends on B having a particular entitlement to trust property. The question of to whom the equity for relief accrues is important to this thesis' account of the function and rationale of the claim in Chapter 9. This question also has significance for a broader debate concerning the availability of equitable relief to discretionary objects. The analysis in this Chapter further assists this thesis' arguments why the proprietary rights account fails to understand the beneficiary's proprietary claim according to its own terms.

The main argument of this Chapter is that the equity for relief asserted by the beneficiary's proprietary claim accrues to beneficiaries with a wide range of entitlements under an express trust, *as well as* to persons interested in charitable trusts, and trustees. Further, the availability of the claim does not depend upon a particular entitlement to trust property. Support for these arguments will be drawn from the cases demonstrating the availability of the claim, and from the *beneficiary principle*.¹

The final introductory point is to articulate, and dismiss, a potential conceptual ambiguity. It is important to be clear that the concern of this Chapter is with the legal person to whom the 'right'² or equity for relief asserted by the beneficiary's proprietary claim accrues, referred to as 'B' by this thesis.³ Chapter 4⁴

¹ *Morice v Bishop of Durham* (1804) 9 Ves 399, 404–05 (Sir William Grant MR); *Morice v Bishop of Durham* (1805) 10 Ves Jr 522, 539–40 (Lord Eldon LC).

² B's 'right' is not absolute and subject to discretion, as will be demonstrated further in Chapter 8, and for this reason will be referred to as an 'equity for relief'.

³ Reference to 'B' and 'beneficiary' is somewhat inaccurate when a person interested in a charitable trust, or T, is the party seeking relief on the basis of the 'beneficiary's' proprietary claim, as discussed in Parts B.3–4 below.

⁴ Chapter 4, Part D.

demonstrated that the ‘right’ or equity asserted by the beneficiary’s proprietary claim is for relief against X as necessary so that it is as if the non-compliant execution had not occurred. This thesis has so far used the label ‘B’ to refer to anyone asserting this equity for relief, without inquiring into the nature of their entitlement, or office under the express trust. This Chapter is *not* concerned with the distinct procedural question of when one person can assert the rights that accrue to another person. The ability for one person to assert the rights of another was mentioned already in Chapter 1.⁵ That Chapter referred to ‘*Vandepitte*’ proceedings whereby a beneficiary will be allowed to assert rights that accrue to T. Another example is found in *Independent Trustee Services Ltd v GP Noble Trustees Ltd*, where a replacement trustee was permitted standing to assert the beneficiary’s proprietary claim which was expressly recognised to have accrued to the objects of a pension trust.⁶ These derivative proceedings raise important questions about when and why one party should be permitted to assert the rights of another. This Chapter, however, is concerned with a different and conceptually preliminary issue: what is the identity of the party to whom the equity for relief asserted by the beneficiary’s proprietary claim accrues?

The arguments in this Chapter will proceed in the following way. Part B will consider who can assert the beneficiary’s proprietary claim. Part C will address the competing arguments that take a narrower approach as to the availability of equitable relief for discretionary objects.

B. Availability of the beneficiary’s proprietary claim

1. Outline

This Part B will show that the equity for relief asserted by the beneficiary’s proprietary claim accrues to: (i) anyone who qualifies as an object under an express trust (Part B.2); (ii) someone interested in a charitable trust (Part B.3); and (iii) a trustee (Part B.4). Part B.5 will show how this pattern of availability is supported by

⁵ Chapter 1, Part C.1.iv.

⁶ See eg: *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 [52] (Peter Smith J); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 [32], [76]–[77].

the beneficiary principle, and how that principle defines important limits to that pattern.

2. Beneficiary’s proprietary claim is available to anyone who qualifies as an object of the trust

Before setting out the availability of the claim, it is necessary to explain how this analysis will distinguish between objects with different entitlements to the trust property under an express trust. The following analysis relies upon a conceptual distinction between an object’s (i) *entitlement to the benefit of trust property*, and (ii) *interest against T*. As explained in Chapter 2,⁷ an object’s interest against T (ii) is the composite of legal relations existing between B and T, which includes, for example, T’s duties and an object’s correlative right to performance of those duties. An object’s interest against T requires T to hold that property, and exercise powers over that property in accordance with the trust terms, and in this regard an object has an entitlement in relation to trust property. Specifically, that trust property is held by T in accordance with the trust terms.

An object’s entitlement *to the benefit of trust property* (i) refers to a specific subset of those legal relations and type of entitlement that *may* form part of an object’s interest against T (ii). As will be discussed in more detail in Part B.2.i below, an entitlement *to the benefit of trust property* is a right to the enjoyment of that property, and is different to the general entitlement that T hold trust property in accordance with the trust terms. As will be discussed further below, whether an object has an entitlement *to the benefit of trust property*, now or in the future, depends on the trust terms.

This Chapter argues that the nature of an object’s entitlement to the trust property is not relevant to the question whether the beneficiary’s proprietary claim is available. This Part B will show that anyone who *qualifies as an object of the trust*, and has an interest against T (ii), can assert the beneficiary’s proprietary claim irrespective of whether they have an entitlement to the benefit of trust property (i). These arguments, however, present a methodological hurdle. The express trust, in theory, permits the creation of a wide range of permutations of an object’s

⁷ Chapter 2, Part C.1.

entitlement to trust property.⁸ For example, the law does not prescribe fixed and definitive categories of types of entitlement that exhaustively define the full range of entitlements to trust property.⁹ This thesis’ argument thus cannot be proven by demonstrating the availability of the claim in relation to a set of definitive categories across the full range of entitlements under an express trust.

Instead, this Part B demonstrates the availability of the beneficiary’s proprietary claim to objects with a diverse range of entitlements, if any, to the benefit of trust property. The discussion will distinguish between: (i) an object with an absolute entitlement to the benefit of trust property; (ii) an object with a future absolute entitlement to the benefit of trust property; (iii) an object of an exhaustive power of appointment; and (iv) a mere object of a non-exhaustive power of appointment. The discussion will show that the equity for relief asserted by the beneficiary’s proprietary claim can accrue to objects across all these categories. On the basis of this observation it will be argued that, in principle, any object is able to assert the claim, and that the nature of her entitlement to trust property is therefore not relevant.

In distinguishing between these categories, it is important to make clear that this thesis should not be understood as suggesting that these categories exhaustively define the range of persons and their interests who may be concerned with an express trust. Further, these categories may not be mutually exclusive, and the divisions between them may be less real than apparent.¹⁰ For example, and as will be discussed further below in Part C, there may in substance be little difference between (ii) an object with a future absolute entitlement to trust property, where her entitlement is defeasible by the exercise of a discretionary power of appointment in the interim, and (iii) an object of an exhaustive power.

Rather, the categories enumerated as (i)–(iv) have been identified and delineated because they include cases where equitable relief is sought by objects in each category, and they display a degree of diversity in the range of entitlements under

⁸ As recognised in *Australian Securities and Investments Commission v Carey (No 6)* (2006) 153 FCR 509 [21] (French J).

⁹ A similar observation was made in relation to the label ‘discretionary trust’ in *Chief Commr Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 [8] (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

¹⁰ As acknowledged in *McPhail v Doulton* [1971] AC 424, 448 (Lord Wilberforce).

an express trust. The other reason for delineating these categories is to facilitate this thesis’ engagement with a competing approach according to which the availability of relief, including the beneficiary’s proprietary claim, is confined to objects who have an absolute entitlement to trust property. That approach has also adopted some of these categories of distinction, in particular (i)–(iii), with which it is necessary to engage in Part C below to explain why this thesis’ arguments should be preferred over the narrower approach.

The following sub-parts (i)–(iv) present the cases concerning the availability of the beneficiary’s proprietary claim across the following categories: (i) an object with an absolute entitlement to trust property; (ii) an object with a future absolute entitlement to trust property; (iii) an object of an exhaustive power; and (iv) a mere object of a non-exhaustive power. Parts B.3–4 will do the same in relation to someone interested in a charitable trust, and the trustee.

i. **An object with an absolute entitlement to trust property**

B is the person to whom the equity for relief asserted by the beneficiary’s proprietary claim accrues. B may be *an object with an absolute entitlement* to the benefit of trust property. An absolute entitlement to the benefit of trust property is a ‘right in equity to be put, so far as practicable ... into a position where directly, or indirectly, or for all practical purposes, [B] ... enjoys or exercises the rights which the law has vested in [T]’.¹¹ An object with such an entitlement may also, subject to meeting other requirements, have a power to call for the trust property from T.¹²

Turning to the availability of the beneficiary’s proprietary claim to the object with an absolute entitlement, it is uncontroversial that such an object can assert the beneficiary’s proprietary claim, as in *Foskett v McKeown*¹³ and *Strang v Owens*,¹⁴ where B had an absolute entitlement to the benefit of trust property.

¹¹ *DKLR Holding Co (No 2) Pty Ltd v Comr Stamp Duties* [1980] 1 NSWLR 510, 520 (Hope JA).

¹² *Saunders v Vautier* (1841) 4 Beav 115, affd on appeal (1841) Cr & Ph 240; *CPT Custodian Pty Ltd v Comr State Revenue* (2005) 224 CLR 98 [43]–[50].

¹³ *Foskett v McKeown* [2001] 1 AC 102.

¹⁴ *Strang v Owens* (1925) 42 WN (NSW) 183.

ii. An object with a future absolute entitlement to trust property

B may be an object who is not presently entitled to the benefit of trust property and instead has an absolute entitlement that accrues in the future. An example is an object entitled in default of appointment who is absolutely entitled to the benefit of whatever, if any, of the trust property has not been appointed in favour of the objects of the power of appointment in the interim period.¹⁵

This category can be further subdivided according to the nature of the contingency upon which the vesting of the absolute entitlement depends. For example, the object entitled in default of appointment, in the example above, has an absolute entitlement that is defeasible by the exercise of a discretionary power. By contrast, an object may have an entitlement that accrues on the death of another object, which is contingent upon the life tenant passing before the remainder object. In this second example, the object has an absolute entitlement that is *not* subject to, or defeasible by, the exercise of discretion, although it is nonetheless subject to a future contingency. We will return to the nature of these contingencies in the discussion in Part C below. The significance of the cases in this category is that they support this thesis’ argument that the beneficiary’s proprietary claim is available to a range of beneficiaries, irrespective of the precise characterisation, or the contingent and speculative nature, of their entitlement to the benefit of trust property.

Turning to the availability of the beneficiary’s proprietary claim, the point to observe is that it is uncontroversial that an object with a future absolute entitlement to the benefit of trust property can assert the beneficiary’s proprietary claim. For example, in *Gadson v Gadson*, B had a future absolute entitlement in default of appointment.¹⁶ There are further examples where B is an object entitled in default of appointment whose absolute entitlement is thus defeasible by the exercise of a dispositive power of appointment prior to the vesting date of B’s interest.¹⁷

¹⁵ See eg: *Cock v Smith* (1909) 9 CLR 773 where T held a power to apply trust funds in favour of S, and C had an absolute entitlement to the residue income during C’s life.

¹⁶ *Gadson v Gadson* [2003] WASC 48.

¹⁷ See eg: *Gilbert v Stanton* (1905) 2 CLR 447; *Cock* (n15); *Duke of Portland v Topham* (1864) 11 HL Cas 32.

Added to this are cases where the nature of the future contingency is not the exercise of a power of appointment, but the happening of certain future events. An illustrative example is *Independent Trustee Services Ltd v GP Noble Trustees Ltd*, where the beneficiary’s proprietary claim was available to the objects of a pension trust.¹⁸ In this case, the beneficiary’s proprietary claim was actually asserted by a replacement trustee, not the pension objects. However, this represented the interplay of the distinct phenomenon referred to above in the Introduction in Part A, whereby one party, the (replacement) trustee, is able to assert the rights of another, in this case, the pension objects. The point for now is that the equity asserted by the beneficiary’s proprietary claim was expressly acknowledged at trial¹⁹ and on appeal²⁰ as accruing to the pension objects. Those objects did not have a present absolute entitlement to the benefit of trust property.

In addition, there is *Fouche v The Superannuation Fund Board* where the beneficiary’s proprietary claim was instituted by a replacement trustee.²¹ We will return to this case in Part B.4 below in relation to the availability of the claim to T. The significance of this case for now is that the High Court of Australia acknowledged that the objects of the superannuation scheme ‘*of course* [have] ... an entitlement to the trust fund which would probably give them standing in a court of equity’ to maintain the beneficiary’s proprietary claim, despite the fact that they did *not* have ‘a beneficial entitlement to the fund as has an ordinary *cestui que trust*’.²²

Finally, there is *Yorkshire Miners’ Association v Howden*, where B’s absolute entitlement to the benefit of trust property was contingent upon the happening of specified future events, and the beneficiary’s proprietary claim was available.²³ Lord Lindley described the plaintiff as having a ‘beneficial interest in the funds of

¹⁸ *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91.

¹⁹ *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 [52] (Peter Smith J).

²⁰ *Independent Trustee Services* (n18) [32], [76]–[77].

²¹ *Fouche v The Superannuation Fund Board* (1952) 88 CLR 609.

²² *Fouche* (n21) 640 (the Court) (emphasis added).

²³ *Yorkshire Miners’ Association v Howden* [1905] AC 256.

the union’,²⁴ and stated that the ‘object [of the plaintiff’s claim] is to vindicate a right to property’.²⁵ However, according to the trust terms, B had a contingent and non-vested entitlement. B was a member of a trade union, which was an unincorporated association that held property for its members under a trust.²⁶ B did not have a presently existing absolute entitlement, and B’s entitlement was contingent upon B’s participation in industrial action that met certain criteria as defined in the trust terms and applicable legislative regime.²⁷ Nonetheless, and as apparent from Lord Lindley’s statements referred to above, B was treated no differently from a beneficiary with an absolute entitlement.

The cases discussed in this Part B.2.ii support this thesis’ argument that the beneficiary’s proprietary claim is available to a range of beneficiaries, irrespective of the precise characterisation, or the contingent and speculative nature, of their entitlement to the benefit of trust property.

iii. An object of an exhaustive power

Turning to another categorisation of entitlement, B may be an object of a dispositive power of appointment that is *exhaustive* in the sense that the donee is subject to a duty to exercise the power.²⁸ The donee thus has a choice as to whom, among the objects, she will appoint property, but she has no choice whether to appoint property at all. An object of an exhaustive power does not, on an individual basis, have an absolute entitlement to the benefit of trust property. However, the object(s) of an exhaustive power *collectively* may be considered to have an absolute entitlement because the donee of this power is subject to an obligation to exercise it.²⁹ For example, acting together, all the objects of an exhaustive power could

²⁴ *Yorkshire Miners’ Association* (n23) 283, see also 281.

²⁵ *Yorkshire Miners’ Association* (n23) 280–81.

²⁶ Trade Union Acts 1871, 1876 (Eng) s 8.

²⁷ Trade Union Acts 1871, 1876 (Eng) s 8.

²⁸ *Re Gestetner Settlement* [1953] Ch 672, 688–89 (Harman J); *McPhail* (n10) 441–42 (Lord Hodson), 445 (Lord Guest), 448–49 (Lord Wilberforce).

²⁹ Assuming the class of objects is closed, see, further: *Glenn v Federal Comr Land Tax* (1915) 20 CLR 490, 503–05; *CPT Custodian* (n12) [43]–[44], [47]; *Sainsbury v IRC* [1970] 1 Ch 712, 724–25 (Ungoed-Thomas J); *Schmidt v Rosewood Estate* [2003] 2 AC 709, 726 (Lord Walker).

exercise the so-called ‘*Saunders v Vautier* power’³⁰ to call for the trust property the subject of that power.³¹

Although a contrary view has been expressed,³² which will be addressed below in Part C, it is tolerably clear from the cases discussed next,³³ that the beneficiary’s proprietary claim, in principle, would be available to an object of an exhaustive power. The significance is to support this thesis’ argument that the beneficiary’s proprietary claim is available to a range of beneficiaries, irrespective of the precise characterisation, or contingent and speculative nature, of their entitlement under a trust.

Consider, for example, *Mercanti v Mercanti*, where the plaintiffs brought proceedings alleging fraudulent exercises of power by the trustee (a power of variation), and appointor (power of appointment).³⁴ The plaintiffs were unable to establish fraud on a power,³⁵ although one plaintiff was awarded interlocutory relief by the High Court of Australia, restraining the trustee, guardian and appointor from exercising powers under the trust until final determination.³⁶ The plaintiffs in this case were mere objects of a non-exhaustive power (discussed next in

³⁰ *Saunders* (n12).

³¹ Assuming a closed class and that there is no-one else with an interest in relation to that property, see further: *CPT Custodian* (n12) [43]–[52].

³² See eg: *Re Manisty’s Settlement* [1974] Ch 17, 25 (Templeman J); L Smith, ‘Massively Discretionary Trusts’ (2017) 70 CLP 17.

³³ In addition to the cases discussed in this Part, see also: *Lemos v Coutts (Cayman) Ltd* (2005) 8 ITELR 153 [47] (Levers J); *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JRC 003 [42]; *El Sayed v El Hawach* [2015] NSWCA 26 [47]–[59] (the Court). There is some academic support as well: R Nolan, ‘Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures’ in PS Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 159–66; L Tucker, N Poidevin and J Brightwell, *Lewin on Trusts* (19 edn, Sweet & Maxwell 2015) [39-073]; G Thomas and A Hudson, *The Law of Trusts* (OUP 2010) [19.07]–[19.11]; J Penner, ‘The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust’ (2014) 26 CJLJ 473, 495–96.

³⁴ *Mercanti v Mercanti* [2016] 50 WAR 495.

³⁵ *Mercanti* (n34) [271] (Buss P), [377]–[379] (Newnes and Murphy JJ).

³⁶ *Mercanti v Mercanti* [2017] HCA 1 (Kiefel J).

Part B.2.iv) *and* together with the other objects, formed part of a class of objects under an exhaustive power arising in default of appointment.³⁷

The plaintiffs had no present or future absolute entitlement to the benefit of trust property, and whether they received anything under the trust was a function of the exercise of discretion in their favour.³⁸ The limited nature of the plaintiffs’ entitlements was acknowledged by Newnes and Murphy JJ, who stated that the plaintiffs ‘have no entitlement to any fixed beneficial entitlement, or proprietary entitlement, in the assets held on trust’; nonetheless, they ‘have the right to due administration of the trust’.³⁹ There was no further express consideration of the plaintiffs’ entitlement to relief. However, the fact that the plaintiffs were able to maintain the proceedings, and that one was granted interlocutory relief, implies that the plaintiffs would have had some entitlement to relief should they have made out a fraud on a power, *despite* the speculative nature of their entitlement.

Similarly, in *Crossman v PILT Nominees Pty Ltd*, an object of a discretionary power under a *sub-trust* was awarded interlocutory relief against the trustee of the *head trust*, restraining what would have been a grant of security over trust property contrary to the trust terms.⁴⁰ In related litigation,⁴¹ Ward JA found that this object of the sub-trust *did* have a chose in action against the *head* trustee in relation to its exercise of power held under the *head trust*, which included an entitlement to relief to prevent a proposed grant of security over trust property that was contrary to the trust terms, and for removal and replacement of the head trustee. We will return

³⁷ The trust terms are summarised in *Mercanti* (n34) [30]–[42]. The plaintiffs were described as ‘beneficiaries’ under the trust terms, according to which they were the objects of a mere power, and also part of the class of discretionary objects of an exhaustive power arising after the vesting date. The first plaintiff had other capacities under the trust, including as guardian, and had prior to trial also held the office of appointor. To the extent that these additional capacities undermine this thesis’ reliance on this case, it is only in relation to this first plaintiff. The second plaintiff had no additional capacities under the trust and could only have been relying on his entitlement as a mere object and object of an exhaustive power under the trust.

³⁸ *Mercanti* (n34) [34].

³⁹ *Mercanti* (n34) [376] (Newnes and Murphy JJ).

⁴⁰ *Crossman v PILT Nominees Pty Ltd* [2008] NSWSC 557 [1]–[2] (Hamilton J); *Crossman v PILT Nominees* [2009] NSWSC 393 (White J).

⁴¹ *Crossman v Sheahan* [2016] NSWCA 200 [50], [264]–[266].

to this case below in Part B.5.ii. Its significance for now is to show how an object of a sub-trust *with no entitlement to the benefit of trust property under a head trust* was permitted to seek relief against the head trustee.

iv. A mere object of a non-exhaustive power

B may be a *mere object* of a *non-exhaustive power* who does not have, presently or in the future, individually or collectively, an absolute entitlement to the benefit of trust property. The donee of a non-exhaustive power has no obligation to exercise the power, and the object’s entitlement to trust property is subject to discretion. Scholars have previously argued that a mere object has no enforceable rights under an express trust, including the beneficiary’s proprietary claim.⁴² Contrary to these arguments, this thesis takes the view that a mere object would be able to assert the beneficiary’s proprietary claim, and that there is some case evidence in support. We will return to these competing arguments below in Part C. The aim for now is to present the case authority in favour of this thesis’ argument that the equity asserted by the beneficiary’s proprietary claim can accrue to a mere object.

Of most significance is *Curwen v Vanbreck Pty Ltd*,⁴³ where two plaintiffs⁴⁴ were objects of a mere power and sought relief in relation to T’s alleged bad faith or improper exercise of a power of exclusion. This case matters because these plaintiffs were only objects of mere powers of appointment⁴⁵ and were *not* entitled in default of appointment. The plaintiffs were not granted relief as neither fraud on a power nor bad faith was made out. Further, this case concerned a claim against T, not the beneficiary’s proprietary claim. This case is, however, significant because the plaintiffs’ ability to seek relief was not questioned at first instance or on appeal.⁴⁶ It is submitted that this case lends some support to the view that the beneficiary’s proprietary claim would have been available against X in the event of a non-compliant exercise of power over trust property.

⁴² See eg: Smith, ‘Massively Discretionary Trusts’ (n32) 22; Nolan (n33) 167–69; *Lewin on Trusts* (n33) [39-074].

⁴³ *Curwen v Vanbreck Pty Ltd* [2009] 26 VR 335.

⁴⁴ Two of four plaintiffs were mere objects; the other two were mere objects and entitled in default of appointment: see *Curwen* (n43) [6]–[11].

⁴⁵ *Curwen* (n43) (the trusts terms are summarised or reproduced at [6]–[11]).

⁴⁶ *Curwen* (n43) [10], [15].

There are other cases⁴⁷ where a mere object is understood to be able to seek relief in respect of the administration of a trust and which support the general proposition that mere objects may have an entitlement to relief, including the beneficiary’s proprietary claim. Also significant is an unreported decision of Holland J in *Randall v Lubrano* which concerned a mere object’s application for T to render accounts in relation to a transfer of trust funds contrary to the trust terms.⁴⁸ In this case, T had ‘extremely wide’⁴⁹ and non-exhaustive powers.⁵⁰ After acknowledging that the mere objects had no entitlement to the benefit of trust property, Holland J went on to state that ‘*there is no doubt* in my mind that the plaintiffs would be proper parties to seek relief in this court’ in relation to a misapplication of trust property.⁵¹

Important for the analysis that follows in Part B.5 is that the cases discussed in this Part B.2.iv ground the availability of relief on facilitating the control of power and due administration of the trust, and not on the nature of B’s entitlement to trust property. This was expressly recognised by Holland J in *Randall v Lubrano*, where his Honour explained that if the mere objects in that case could not seek equitable relief, then the trustee ‘could do as he pleases with the trust property and commit any breach of trust that he cared to commit’.⁵²

A similar theme is expressed in *Spellson v George*, where it was found that the object of a discretionary power of appointment has a right to certain information

⁴⁷ See eg: *Spellson v George* (1987) 11 NSWLR 300, 316 (Powell J), discussed below; *Public Trustee v Smith* [2008] NSWSC 397 [107], where White J found that a mere object ‘was entitled to enforce due administration of the trust’. The relevant trust terms are set out at [14]–[30], [77]. See also: *Deutsch v Deutsch* [2012] VSC 227, [39]–[41], where the plaintiffs ‘[f]or the most part’ were mere objects and considered able to bring derivative proceedings in relation to misappropriation of trust funds, [39]–[42] (Hargrave J).

⁴⁸ *Randall v Lubrano* (unreported, NSWSC, Holland J, 31 October 1975), published as an annexure to *McDonald v Ellis* (2007) 72 NSWLR 605, 621.

⁴⁹ *Randall* (n48) [1].

⁵⁰ *Randall* (n48) [4].

⁵¹ *Randall* (n48) [4] (emphasis added).

⁵² *Randall* (n48) [7] (Holland J).

from the trustee and that this entitlement is based upon what is necessary to hold the trustee to account.⁵³ Powell J stated:

It is clear that the object of a discretionary trust, even before the exercise of the trustee’s discretion in his favour, does have rights against the trustee [T]hose rights ... are not restricted to the right to have the trustee bona fide consider whether or not to exercise his (the trustee’s) discretion in his (the object’s) favour, *but extend to the right to have the trust property properly managed and to have the trustee account for his management.*⁵⁴

This aspect of Powell J’s decision was referred to with approval in *Schmidt v Rosewoods Estates*, where the Board of the Privy Council held that an object of a discretionary power could seek certain trust information from the trustee.⁵⁵ It is submitted that the emphasised part of Powell J’s reasoning in *Spellson v George* set out above should be understood to include reference to a mere object’s ability to assert the beneficiary’s proprietary claim.

In addition, there are other cases that have recognised that a mere object can bring derivative proceedings to assert T’s rights, where T fails to do so.⁵⁶ It is submitted that these cases lend further support to this thesis’ argument that the equity asserted by the beneficiary’s proprietary claim accrues to a mere object. It must be acknowledged that this argument is controversial in light of contrary academic opinion,⁵⁷ and requires further examination as to its potential implications. These implications will be considered in Part B.5, and the contrary academic opinion in Part C.

3. Beneficiary’s proprietary claim and charitable trusts

This Part B.3 considers the availability of the beneficiary’s proprietary claim in relation to charitable trusts. Strictly speaking, using the label ‘*beneficiary’s* proprietary claim’ in this context is inaccurate, as charitable trusts do not have

⁵³ *Spellson* (n47).

⁵⁴ *Spellson* (n47) 316 (Powell J) (emphasis added; citations omitted).

⁵⁵ *Schmidt* (n29) [59].

⁵⁶ See eg: *Deutsch* (n47) [39]–[41] (Hargrave J).

⁵⁷ See n42.

individual beneficiaries.⁵⁸ A trustee of a charitable trust does not hold property for a beneficiary or object, but for a charitable purpose. That purpose must be sufficiently defined and satisfy a body⁵⁹ of statutory and equitable principle on what constitutes valid charitable purposes. As there is no beneficiary, enforcement of the trust is delegated to the Attorney-General (with or without a relator) on behalf of the Crown as *parens patriae* (parent of the country), or another party with leave of the court.⁶⁰

In summary, the ‘beneficiary’s’ proprietary claim is available in relation to charitable trusts. The equity asserted by the claim is enforceable by the Attorney-General, and in substance will be agitated by a person interested in the charity, who obtains leave of the court to pursue proceedings. For example, in *A-G v Compton*, X was required to return to T the traceable substitute of property misapplied from a charitable trust.⁶¹ This claim was maintained by the Attorney-General on the relation of members of the parish interested in the charity. Sir Knight Bruce VC explained that the right asserted by the claim is vested in the public generally, stating:

The right to the fund is not vested in any single individual, or in any number of individuals. The beneficial right to the fund is in the public generally of that district, for whose benefit in a particular manner it is to be applied by the public officers of that district.⁶²

Likewise, in *A-G v Earl of Chesterfield*, Sir John Romilly stated when speaking of a charitable trust:

If a stranger has property belonging to a charity ... he is a proper party to a suit instituted by the Attorney-General, whether *ex officio*, or at the relation of

⁵⁸ See generally: J Heydon and M Leeming, *Jacob’s Law of Trusts in Australia* (8th edn, LexisNexis 2016) [10-05].

⁵⁹ A sample includes: Statute of Charitable Uses 1601, 43 Eliz I, c 4; Imperial Acts Application Act 1969 (NSW) s 9(2)(a); *A-G (NSW) v Perpetual Trustee Co Ltd* (1940) 63 CLR 209, 222–24 (Dixon and Evatt JJ); *Gilmour v Coats* [1949] AC 426, 442–43 (Lord Simonds).

⁶⁰ See eg: Charitable Trusts Act 1993 (NSW) ss 5–7.

⁶¹ *A-G v Compton* (1842) 1 Y & C Ch Cas 417, 427.

⁶² *A-G v Compton* (n61) 427.

private individuals, to compel him to account for and to deliver up the property of the charity.⁶³

There are further cases which follow a similar pattern:⁶⁴ the Attorney-General, on the relation of a party interested in the charity, is able to assert the beneficiary’s proprietary claim against X, who is required to return property misapplied from a charitable trust.

The availability of the (beneficiary’s) proprietary claim in the charitable trust context demonstrates that the claim is not confined to those who have an entitlement to the benefit of trust property. A charitable trust does not exist for beneficiaries who can be analogised as having an absolute entitlement to the benefit of trust property or as the equitable owners of trust property.⁶⁵ Having regard to the nature of a charitable trust, the significance of this category is to show that the claim is concerned with facilitating the control of power held subject to an express trust.

4. Beneficiary’s proprietary claim is available to trustees

The final category is where T, often a replacement trustee, may have an entitlement to recovery of trust property from X. One case example has been mentioned already, *Fouche v The Superannuation Fund Board*, where the replacement trustee of a superannuation fund successfully asserted the ‘beneficiary’s’ proprietary claim.⁶⁶ (This thesis’ label is, again, less accurate in this category.) The High Court of Australia acknowledged that the claim was the same as that which would have been available to the objects in their own right, but was maintained by the trustee in this instance.⁶⁷

Similarly, in *Redman v Permanent Trustee Co of New South Wales Ltd* T asserted the ‘beneficiary’s’ proprietary claim against a subsequent assignee of an appointee claiming an equitable interest under an improperly exercised dispositive power of

⁶³ *A-G v Earl of Chesterfield* (1854) 18 Beav 596, 599–600.

⁶⁴ See eg: *A-G v Christ’s Hospital* (1834) 3 My & K 344; *A-G v Hall* (1853) 16 Beav 388.

⁶⁵ As discussed in *Willoughby City Council v Roads and Maritime Services* (2014) 201 LGERA 177 [29] (Biscoe J).

⁶⁶ *Fouche* (n21).

⁶⁷ *Fouche* (n21) 640.

appointment.⁶⁸ Despite being asserted by T, the reasoning in the judgment suggests that the claim being asserted is the beneficiary’s proprietary claim, having regard to the court’s characterisation of the relevant issue as the priority of the equitable beneficial interest under the express trust against the later equitable interest of a subsequent assignee.⁶⁹

There are more cases that follow this pattern.⁷⁰ Their significance is that they show that the claim is not confined to an object, let alone an object with an absolute entitlement to trust property. Before moving on, it is important to acknowledge that the availability of the claim to T may raise the further question whether the beneficiary’s proprietary claim is available to other parties who may be interested in an express trust, such as a settlor or other party who is conferred rights and powers under a trust, such as a protector or guardian. Resolution of this question requires determination of a broader issue as to the roles and rights of these other parties under an express trust.⁷¹ This is beyond the scope of this thesis, save to make one observation: I have not found any case suggesting that the beneficiary’s proprietary claim is available outside the categories listed in Parts B.2–4.

5. Limits to the availability of beneficiary’s proprietary claim and the beneficiary principle

Parts B.2–4 above have argued that the beneficiary’s proprietary claim is not confined to a beneficiary with an absolute entitlement to the benefit of trust

⁶⁸ *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84.

⁶⁹ *Redman* (n68).

⁷⁰ Where the claim is available, or recognised as being available to T, see eg: *Young v Murphy* [1996] 1 VR 279, 281–83 (Brooking J); *Morlea Professional Services Ltd v Richard Walter Pty Ltd (in liq)* (1999) 96 FCR 217 [51] (the Court); *Re Cemcon* [2009] FCA 696 [20] (Gordon J). Similarly, the equity asserted by the beneficiary’s proprietary claim accrues to the trustee of a charitable trust: *Krnjulac v Lincu* [2015] NSWCA 367; *Presbyterian Church of Victoria Trusts Corp v Anstee* [2017] VSC 102 [14]–[20] (Sifris J). Note that it is not necessary for the Attorney-General to be a party where T seeks relief against X for recovery of charitable trust property: *Uniting Church in Australia Property Trust (NSW) v Monsen* [1978] 1 NSWLR 575, 587–91 (Rath J).

⁷¹ See generally: L Ho, “‘Breaking Bad’: Settlor’s Reserved Powers’ in R Nolan, K Low and T Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018); R Nolan, ‘Trustees and Third-Party Powers’ in R Nolan, K Low and T Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018); Nolan, ‘Invoking the Administrative Jurisdiction’ (n33) 169–72.

property, and that the availability of the claim extends to objects who have a contingent or speculative entitlement, persons interested in a charitable trust, and a trustee. Further support for this argument can be garnered from: (i) the beneficiary principle (Part B.5.i); and (ii) the fact that there are important limits to this pattern of availability (Part B.5.ii). The analysis in this Part B.5 will also contribute to this thesis’ arguments in Part C regarding why a competing approach to who can assert the beneficiary’s proprietary claim should not be accepted.

i. The beneficiary principle

The first foundation in support of this Chapter’s argument as to the availability of the beneficiary’s proprietary claim is the *beneficiary principle*. This principle expresses one of the fundamental requirements for the creation of an express trust: certainty of object, according to which the objects, or charitable purpose, of a trust must be sufficiently defined for the validity of an express trust.⁷² The relevance of this principle is that, on this thesis’ interpretation, the availability of equitable relief in relation to an express trust depends on what is necessary to permit the court’s supervision and control of power held subject to an express trust. The beneficiary principle ensures adequate definition of those who can seek the court’s assistance in controlling the exercise of power held subject to an express trust.

The principle thus defines one of the conditions necessary for the existence of the essential feature of an express trust: the trustee’s subjection to control over her exercise of power.⁷³ The principle is one further emanation of equity’s institutional commitment to the essential feature of an express trust. On this interpretation, the beneficiary principle supports the wide availability of the beneficiary’s proprietary claim.

Before further explaining how this principle supports this thesis’ argument, it is important to acknowledge that I interpret the beneficiary principle differently to other scholars. For example, according to Professor Lionel Smith⁷⁴ this principle demands sufficient definition of a beneficiary who has *a right to the benefit of the trust property*. The implication is that it is only a beneficiary who is so entitled who

⁷² See n1.

⁷³ Chapter 3, Part C.3.ii.

⁷⁴ Smith, ‘Massively Discretionary Trusts’ (n32) 19–23.

can seek relief under an express trust. The significance of this different interpretation is that the beneficiary principle supports a narrower approach to the question considered in this Chapter (being, who can assert the beneficiary’s proprietary claim?) On Professor Smith’s narrower approach, the beneficiary’s proprietary claim is only available to an object with an absolute entitlement to the benefit of trust property.

The interpretation of the beneficiary principle thus has significance for supporting this thesis’ positive argument as to the availability of the claim; it also assists this thesis’ arguments countering the narrower approach in Part C below. It is submitted that this thesis’ interpretation of the beneficiary principle should be preferred having regard to: (a) the supporting cases; and (b) the essential feature of an express trust, each of which is discussed in turn.

a. Supporting cases

Support for this thesis’ interpretation of the beneficiary principle can be found in the cases from which this principle is derived, and later case authority. One of the foundational cases is *Morice v Bishop of Durham* where Lord Eldon LC relevantly stated:

it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust ... unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the court can neither reform maladministration, nor direct a due administration.⁷⁵

According to Lord Eldon LC, the principle facilitates the court’s effective review of the trustee’s exercise of her power over trust property, and, if necessary, the court’s control of that power.⁷⁶

It is acknowledged that the form and use of express trusts have changed since the time that Lord Eldon LC was writing. However, the underlying rationale of the principle is the same: ensuring sufficient definition of the object(s) able to seek the

⁷⁵ *Morice* (n1) (1805) 539–40.

⁷⁶ In relation to the ‘contemporary importance of the court’s inherent jurisdiction’ over the administration of express trusts, see further: R Nolan, ‘The Execution of a Trust Shall Be under the Control of a Court’ (2016) 2 CJCL 469.

court’s assistance in controlling the trustee’s exercise of power. Later case authority supports this continued rationale. Leading examples are *Schmidt v Rosewood*,⁷⁷ *McPhail v Doulton*⁷⁸ and *Spellson v George*⁷⁹ which all express the beneficiary principle in similar terms. For example, the principle is described as giving effect to:

one of the essential elements of a private trust ... that the trustee is subject to a personal obligation to hold, and to deal with, the trust property for the benefit of some identified, or identifiable, person or group of persons.⁸⁰

In addition, there is *Leahy v A-G (NSW)*, where the beneficiary principle is expressed as ensuring that there is a legal person who can enforce the trust.⁸¹

b. The essential feature of an express trust

The key point of difference between Professor Lionel Smith’s narrower conception of the beneficiary principle, and that preferred in this thesis, relates to the essential feature of an express trust. According to Professor Smith, the essential feature is that B is entitled *to the benefit of the trust property* and T has a correlative obligation *to hold property for the benefit of B*.⁸² Following from this, the beneficiary principle requires sufficient definition of those who have an entitlement to the benefit of trust property, either immediately or in the future, and it is only those beneficiaries who can seek relief.

⁷⁷ *Schmidt* (n29) [36], [40]–[42].

⁷⁸ *McPhail* (n10) 439 (Lord Hodson): ‘[In *Morice v Bishop of Durham*] [i]t was there recognised that the accepted test of the validity of a trust was that it must be such as the court can control.’

⁷⁹ *Spellson* (n47) 315–16 (Powell J).

⁸⁰ *Spellson* (n47) 315–16 (Powell J).

⁸¹ *Leahy v A-G (NSW)* [1959] AC 457, 478–79 (the Board); *Yeomans v Yeomans* [2006] 1 Qd R 390 [8]–[9] (McMurdo J).

⁸² Smith, ‘Massively Discretionary Trusts’ (n32) 19–21. See also: J Penner, *The Law of Trusts* (7th edn, OUP 2010) 244, where it is argued that a trust requires B to have an interest akin to ownership. This view is continued in J Penner, ‘The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust’ (n33) 486, 495–96; however, Professor Penner in this article also characterises the essential feature as being B’s interest in T’s ‘exercise of his powers over the trust assets in accordance with the terms of trust’: 500, see also 482–83. See further: S Gardner, *An Introduction to the Law of Trusts* (2nd edn, Clarendon Press 2003) 216–17.

On this thesis’ approach, the essential feature of an express trust is different. It is that T holds her title to, and exercises her powers over, trust property *in compliance with the terms of trust*. Recall the distinction made in Part B.1 above between an object’s (i) *entitlement to the benefit of trust property*, and (ii) *interest against T* which is that T exercises her powers over trust property in accordance with the trust terms. This thesis’ position is that only (ii) is essential to an express trust and the trust terms may *or may not* confer upon B a right to the benefit of trust property. The beneficiary principle gives effect or substance to the essential feature by ensuring that there is a legal person(s) who is sufficiently identified and who can seek the court’s assistance in controlling T’s exercise of power.

This thesis’ view that a right to the benefit of trust property is *not* essential can be supported by reference to the cases which recognise that it is not necessary for the terms of an express trust to confer a beneficial interest on anyone. In Australian law, the idea that an express trust must create equitable ownership has been rejected.⁸³ It is thus submitted, contrary to Professor Smith’s interpretation of the essential feature of an express trust, that it is not essential for an express trust to create an absolute entitlement *to the benefit* of the trust property.

This thesis’ position is further supported by the case descriptions of the essential feature of an express trust. These, as discussed in Chapter 3, indicate that the trustee holds her title to and uses her powers over trust property *in accordance with the trust terms*, as opposed to doing so specifically for the benefit of B.⁸⁴ It is acknowledged that some other cases describe the essential feature in terms that the trustee is obliged to hold trust property *for the benefit of B*, rather than the broader conception preferred by this thesis, *in accordance with the trust terms*, as

⁸³ See eg: *Glenn* (n29) 497 (Griffith CJ); *CPT Custodian* (n12) [25] (the Court); *FCT v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592 [30].

⁸⁴ See also: *Target Holdings v Redfems* [1996] 1 AC 421, 434: ‘The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law’; *Green v Russell* [1959] 2 QB 226, 241; *Space Investments Ltd v CIBC Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072, 1073–74; *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20 [82] (Bell, Gageler and Nettle JJ); *Akers v Samba Financial Group* [2017] AC 424 [82] (Lord Sumption); J Campbell, ‘Access by Trust Beneficiaries to Trustees’ Documents, Information and Reasons’ (2009) 3 J Eq 97, 142.

in *Spellson v George*⁸⁵ and *DKLR Holding Co (No 2) v Comr Stamp Duties*,⁸⁶ for example. However, these statements must be read in context. In *both* cases, the judgments later acknowledge (consistent with the position taken in this thesis) that some express trusts may not confer a right to the benefit of the trust property in B. Further, both cases also describe the essential feature of an express trust as being that B’s right and T’s obligation ‘is essentially ... [that T] ... hold and use his legal rights *in accordance with the terms of the trust*’.⁸⁷

Further, *Spellson v George* itself concerned the entitlements of an object who did not have an absolute entitlement to the benefit of trust property. Specifically, Powell J elsewhere described the ‘essential’ and ‘fundamental’ nature of an express trust as being B’s ‘right to have the trust property properly managed and to have the trustee account for his management’.⁸⁸ This right was expressly recognised as available to ‘a person whose status is only that of a potential object of the exercise of a discretionary power’ and who does *not* otherwise have any right to the benefit of trust property.⁸⁹

If this thesis’ characterisation of the essential feature of an express trust is accepted, its significance is to support this thesis’ interpretation of the beneficiary principle. That principle gives effect or substance to the essential feature of an express trust by ensuring that there is a legal person(s) who is sufficiently defined to seek the court’s assistance in controlling T’s exercise of power. Critically, it does *not* necessarily follow that this person must have or will have a right to the benefit of trust property. In turn, any beneficiary (labelled an object or not) should be able to assert the beneficiary’s proprietary claim, as demonstrated by the cases discussed in Part B above.

The further significance of the beneficiary principle is that, on the interpretation favoured in this thesis, it also provides guidance on the limits to when an object can assert the beneficiary’s proprietary claim. These limits are discussed next.

⁸⁵ *Spellson* (n47) 315 (Powell J).

⁸⁶ *DKLR* (n11) 518–19 (Hope JA).

⁸⁷ *DKLR* (n11) 520 (Hope JA) (emphasis added). See also: *Spellson* (n47) 315–16 (Powell J).

⁸⁸ *Spellson* (n47) 316 (Powell J).

⁸⁹ *Spellson* (n47) 316 (Powell J).

ii. The limits to this pattern of availability of the beneficiary’s proprietary claim

Finally, it is necessary to identify the limits to the availability of the beneficiary’s proprietary claim. This is important to demonstrate the further significance of the beneficiary principle and to address a competing argument. Against this thesis, it might be contended that unintended consequences would follow from recognising that the equity asserted by the beneficiary’s proprietary claim accrues to anyone who qualifies as an object. In particular, might it be possible for a mere object of a wide power to tie a trustee down in spurious litigation? The answer to this concern is, no. This is because there are limits to an object’s ability to assert the beneficiary’s proprietary claim, and the beneficiary principle defines some of these limits.⁹⁰

On this thesis’ conception of the beneficiary principle, the principle is concerned with giving effect to the essential feature of an express trust. The principle defines who can seek equitable relief, including the beneficiary’s proprietary claim, to permit the control of power held subject to an express trust. The beneficiary principle thus explains why an object should, in principle, be able to seek relief *and* the circumstances in which the object should *not*. Whether a given object can seek equitable relief is determined by whether the object’s action is necessary to permit the control of power. This is a fact-specific assessment of what is necessary and is informed by the trust terms and surrounding circumstances. In making this argument, it is acknowledged that it is a relatively open-textured assessment and results in difficulty in defining absolute boundaries between different scenarios. Further, there is no express support in the cases that the limits to an object’s entitlement to relief are defined in this way.

However, there are some cases that engage in some assessment of whether the plaintiff’s action will facilitate the control of power in the specific circumstances, and these cases provide some implicit support for this thesis’ arguments. One case example which concerned the beneficiary’s proprietary claim is *Crossman v PILT Nominees*,⁹¹ discussed above in Part B.2.iii. In this case, the object of a power held under a *sub*-trust was able to seek relief against a *head* trustee. The relevant

⁹⁰ There are other doctrines, such as abuse of process, that would impose other limits.

⁹¹ *Crossman v PILT Nominees Pty Ltd* [2008] NSWSC 557 (Hamilton J); *Crossman v PILT Nominees* [2009] NSWSC 393 (White J). See also: *Crossman v Sheahan* (n41) [87]–[93] (Ward JA).

concern was whether the object was sufficiently interested in securing the due administration of the head trust, irrespective of the fact that the object had no entitlements under the head trust. A similar theme is present in some cases that consider an object’s access to trust information, and condition that access upon what is necessary to permit the control of T’s exercise of power and due administration of trust.⁹²

In addition, there are cases in which the court has considered whether to permit B standing to assert T’s rights against a third-party; these have been mentioned already under the label ‘*Vandepitte* proceedings’.⁹³ These cases again show that the court engages in a qualitative assessment of whether an object is sufficiently interested in seeking to control the exercise of power and secure the due administration of the trust. Again, the nature, if any, of an object’s entitlement to the benefit of trust property is not determinative of this issue. For example, in *Ramage v Waclaw*, key to the assessment was whether B was materially interested in due enforcement of the trustee’s claims or would be prejudiced if the claims were abandoned.⁹⁴ Likewise, in *Highland v Labraga*, Young CJ in Eq considered as relevant that B, while one of many potential objects under a discretionary power, was nonetheless ‘probably ... [the trust’s] principle beneficiary’ and a ‘prominent beneficiary’ in light of the surrounding circumstances.⁹⁵

Taken together, it is submitted these cases demonstrate that there are limits to the extent to which an object can seek equitable relief. An opportunistic object who has identified some strategic self-interest in asserting the beneficiary’s proprietary claim that, in the circumstances has little prospect of securing the control of T’s power, will be unlikely to proceed in maintaining that claim. Arguably, this thesis’ approach to the availability of the beneficiary’s proprietary claim will not result in unintended consequences. An object will be limited to asserting the beneficiary’s

⁹² See eg: *Spellson* (n47) 315–16 (Powell J); *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405, 416 (Kirby P); *Schmidt* (n29) [51]–[54], [66]–[67] (Lord Walker). However, there is a competing view according to which access to trust information depends upon the object having an entitlement to trust property, see eg: *Re Londonderry’s Settlement* [1964] Ch 594. See further: Campbell (n84).

⁹³ Chapter 1, Part C.1.iv.

⁹⁴ *Ramage v Waclaw* (1988) 12 NSWLR 84, 91.

⁹⁵ *Highland v Labraga (No 2)* [2005] NSWSC 1212 [16]–[19].

proprietary claim to circumstances where the object facilitates the control of power held subject to an express trust.

Finally, it is important to be clear that the approach advocated here does not mean that an object is able to seek the return of misapplied trust property to herself directly. Discretionary objects are limited to relief that restores property *back into trust*. Only a beneficiary who *is* absolutely entitled, and who has the power to call for the trust property,⁹⁶ can seek direct recovery.

C. Addressing competing arguments

The issue of the availability of the beneficiary’s proprietary claim must be understood as existing within a broader debate over an object’s ability to seek equitable relief in relation to an express trust.⁹⁷ In outline, this debate is about whether, and when, an object who is not absolutely entitled to the benefit of trust property has entitlements under an express trust, and in aid of which she can seek equitable relief, for example access to trust information.⁹⁸ Divergent views have been expressed in the case law and academic materials; these, broadly speaking, can be grouped according to a ‘narrow approach’⁹⁹ and a ‘wide approach’.¹⁰⁰ The wide approach is that advocated in the discussion above in this Chapter.

The narrow approach, by contrast, confines the availability of equitable relief, including the beneficiary’s proprietary claim, to an object with an entitlement to the benefit of trust property.¹⁰¹ There is variance within the narrow approach as to

⁹⁶ See Chapter 4, Part D.1.iii.

⁹⁷ A small sample include: *Hartigan Nominees* (n92); *Blenkinsop v Herbert* [2017] WASCA 87 [72] (the Court); *Gartside v IRC* [1968] AC 553, 604 (Lord Reid), 617 (Lord Wilberforce); *Sainsbury* (n29) 723–24; *Comr Stamp Duties (Qld) v Livingston* [1965] AC 694, 712–14; D Waters, ‘The Nature of the Trust Beneficiary’s Interest’ (1967) 45 Can Bar Rev 219; D Barnett ‘The Nature of a Beneficiary’s Interest in the Assets of an Express Trust’ (2004) 10 APLJ 1, 32–34.

⁹⁸ A small sample includes: *Hartigan Nominees* (n92); *Avanes v Marshall* (2007) 68 NSWLR 595; *Re Londonderry’s Settlement* [1964] Ch 594; *Schmidt* (n29) [51]–[67] (Lord Walker); Campbell (n84).

⁹⁹ See eg: Smith, ‘Massively Discretionary Trusts’ (n32).

¹⁰⁰ See eg: *Spellson* (n47) 316 (Powell J); *Schmidt* (n29) [51]–[67].

¹⁰¹ See eg: Smith, ‘Massively Discretionary Trusts’ (n32) 19–23; L Smith, ‘Prescriptive Fiduciary Duties’ (2018) 37 UQLJ 261, 280, fn 91.

how an absolute entitlement is identified. For example, there is division over whether a beneficiary with a defeasible absolute interest who is entitled in default, or the collective interest of objects of an exhaustive power, will suffice (categories (ii) and (iii) in Part B.2 above).¹⁰² The significance of this division is addressed further below. The point for now is that the common theme of the narrow approach is that an absolute entitlement to the benefit of the trust property is required for B to bring the beneficiary’s proprietary claim.¹⁰³ Support for the narrow approach is drawn from an assumed lack of cases suggesting otherwise,¹⁰⁴ and invocation of the ‘beneficiary principle’.¹⁰⁵

The narrow approach thus presents a challenge for this Chapter. According to it, a narrower range of objects can seek relief under an express trust, including the beneficiary’s proprietary claim. This Part C will confront this challenge by setting out three reasons why the narrow approach should not be accepted. *First* it is not supported by the case evidence. *Second*, its underlying premise is based on an overly restrictive interpretation of the beneficiary principle. *Third*, the narrow approach suffers definitional inaccuracy. These arguments will proceed in the following way: Part C.1 will address the case evidence; Part C.2, the beneficiary principle; and Part C.3, definitional inaccuracy.

1. Case evidence

One premise of the narrow approach is the (inaccurate) assumption that there is a lack of case authority indicating that a mere object has an entitlement to equitable relief.¹⁰⁶ With respect, it is submitted that the Australian cases such as *Curwen v*

¹⁰² Contrary to Professor Lionel Smith, *ibid*, Professor Nolan, for example, takes the position that such objects *do* have a sufficient entitlement to seek relief: Nolan, ‘Invoking the Administrative Jurisdiction’ (n33) 159–69.

¹⁰³ See also: Penner (n33) 495–96.

¹⁰⁴ See eg: Smith, ‘Massively Discretionary Trusts’ (n32) 22–23.

¹⁰⁵ *ibid* 20–22.

¹⁰⁶ *ibid*. A lack of which has been acknowledged before: R Nolan, ‘Equitable Property’ (2006) LQR 122 fn 107; M Conaglen, ‘Thinking about Proprietary Remedies for Breach of Confidence’ (2008) 1 IPQ 82, 89, fn 57.

Vanbreck Pty Ltd,¹⁰⁷ *Randall v Lubrano*¹⁰⁸ and *Spellson v George*,¹⁰⁹ discussed in Part B.2 above, demonstrate the existence of Australian case authority that tends in favour of a mere object having an entitlement to equitable relief, which would include the beneficiary’s proprietary claim.

Further, there is *Schmidt v Rosewood*, which supports the view that an object has some entitlements under an express trust.¹¹⁰ It should be acknowledged, however, that the authority of this case as a matter of English law has been questioned. Professor Lionel Smith has argued that *Schmidt v Rosewood* is of less significance as it is an appeal from the Isle of Man, and that jurisdiction has a different conception of the beneficiary principle.¹¹¹ The beneficiary principle and its relevance to the arguments in this Chapter were discussed above in Part B.5, and will be further addressed next in Part C.2. For now, it can be said that, irrespective of the authority of *Schmidt v Rosewood*, this Chapter has presented Australian authority in favour of an object, whether of an exhaustive power or non-exhaustive power, having an entitlement to seek relief in relation to the exercise of powers held subject to an express trust.

Next, it is necessary to deal with the statements in *Re Manisty’s Settlement*, because this case is relied upon by proponents of the narrow approach, such as Professor Smith, as excluding a mere object from seeking equitable relief.¹¹² The relevant passage is that of Templeman J who stated that the object of a power:

may only apply to the court which may remove the trustees and appoint others in their place. This as I understand it, is the only right and remedy of any object of the power.¹¹³

¹⁰⁷ *Curwen* (n43).

¹⁰⁸ *Randall* (n48) 621.

¹⁰⁹ *Spellson* (n47).

¹¹⁰ *Schmidt* (n29).

¹¹¹ Smith, ‘Massively Discretionary Trusts’ (n32) 36–37 fn 16. Professor Smith’s argument is made on the basis that the Isle of Man, like Jersey, allows an object without an entitlement to the benefit of trust property to obtain information about a trust. With respect, Professor Smith’s position assumes the content and rationale for the beneficiary principle in the first place.

¹¹² L Smith, ‘Massively Discretionary Trusts’ (n32) 20–22.

¹¹³ *Re Manisty’s Settlement* (n32) 25.

It is submitted that *Re Manisty’s Settlement* does not necessarily tend to the conclusion that a mere object is precluded from seeking relief under a trust, including the beneficiary’s proprietary claim. The court in that case did not directly consider the broader question whether objects of a power (exhaustive or non-exhaustive) had any entitlement to equitable relief, let alone the beneficiary’s proprietary claim. At issue was the validity of a power to appoint additional objects except certain persons named in an excluded class, and whether this power was practically unlimited and too uncertain.

In *Re Manisty’s Settlement*, Templeman J found that the power was not so wide as to preclude the trustees from considering in a sensible manner whether and how to exercise the power.¹¹⁴ The passage set out above must be understood within its context as part of Templeman J’s explanation of why the power was not void for uncertainty. Templeman J was not defining an exclusive list of duties owed and rights available to the objects, but was explaining why the specific power under consideration was not unworkable and did not prevent the trustees from sensibly performing their duty to consider the exercise of the power from time to time. It is in this context that the comments ought to be understood.

2. Beneficiary principle

The second reason why the narrow approach should not be accepted is that its underlying premise is based on an overly restrictive interpretation of the beneficiary principle. As discussed above in Part B.5, that principle defines one of the requirements for the validity of an express trust. According to the restrictive interpretation of the beneficiary principle, the validity of an express trust requires definition of a beneficiary with a right to the benefit of trust property. On the basis of this restrictive interpretation, it is only this beneficiary who can seek equitable relief in relation to an express trust.

Part B.5 explained that this restrictive interpretation is based on an incorrect premise regarding the essential feature of an express trust, and, further, is not supported in the cases. Part B.5 set out this thesis’ arguments why the beneficiary principle, properly understood, is one means of implementing equity’s institutional commitment to the essential feature of an express trust via the sufficient definition

¹¹⁴ *Re Manisty’s Settlement* (n32) 25–29.

of those able to seek equitable relief to ensure that T exercises her powers in accordance with the trust terms. On this thesis’ interpretation, the beneficiary principle does not support the narrow approach but, rather, lends support to this Chapter’s argument about the pattern of availability of the beneficiary’s proprietary claim.

3. The role of discretion or future contingency in determining the existence, not just creation, of B’s entitlement

This Part C.3 explains why the narrow approach suffers definitional inaccuracy. As mentioned above in Part C.1, the narrow approach confines the availability of relief under an express trust to those who have, or will have, *a right to the benefit of trust property*.¹¹⁵ The problem with this approach is that it relies on categories of distinction that do not actually provide a meaningful indication by which to determine the availability of equitable relief. Thus, the narrow approach, according to its own terms, fails sufficiently to explain who can seek equitable relief.

To make out this argument, it is necessary to set out in more detail the distinctions drawn by the narrow approach and the assumptions upon which they are based. These categories of distinction were introduced in Part B.2 above. Proponents of the narrow approach distinguish between, on the one hand: (i) an object with an absolute entitlement to trust property; (ii) beneficiaries entitled in default of appointment; and (iii) objects of an exhaustive power; and on the other hand (iv) a mere object of a non-exhaustive power. This distinction between (i)–(iii) and (iv) is made according to the stability and certainty with which B can be understood to have, or will acquire, an absolute right to the benefit of trust property.

According to the narrow approach, the critical variable is the certainty and stability of the object’s entitlement to the benefit of trust property. Thus, the mere object in category (iv) does *not* qualify as someone able to seek equitable relief, as she will only acquire an entitlement to the benefit of trust property on the exercise of discretion. By contrast, the beneficiary entitled in default of appointment in category (ii) is able to seek equitable relief as she will acquire an entitlement to the

¹¹⁵ L Smith, ‘Massively Discretionary Trusts’ (n32) 20–23; Nolan, ‘Invoking the Administrative Jurisdiction’ (n33) 159–69.

benefit of trust property in the future. *Some*,¹¹⁶ not all,¹¹⁷ proponents of the narrow approach take the position that the object of an exhaustive power in category (iii) likewise can seek equitable relief, because she has an absolute interest, on the assumption the beneficiaries can act collectively.

Turning to the problems with this approach. *First*, as mentioned in Part C.1 above, the case evidence set out in Part B.2.iv demonstrates the availability of relief to a mere object and should, alone undermine the narrow approach.

Second, the narrow approach assumes that the categories (ii)–(iv) present meaningful distinctions according to which one can assess the certainty and stability of an object’s entitlement, and in turn an object’s entitlement to equitable relief. This assumption is problematic because these distinctions are less real than apparent once regard is had to the role of discretion or some contingency in determining the *existence* of B’s entitlement to the benefit of trust property across *all* these categories.

The narrow approach focuses upon the role of discretion in *creating* an object’s entitlements across categories (iii) (objects of an exhaustive power) and (iv) (a mere object of a non-exhaustive power). However, no regard is had to the fact that discretion may play a role in determining the existence and extent of the interest of the object in *category (ii)*, who has an entitlement to the benefit of trust property in default of appointment, or some other future contingency. As explained in Part B.2, an object in category (ii) has a future absolute entitlement that can be *extinguished or varied* by the exercise of a discretionary power during the interim period, or that might be contingent upon the happening of certain events. The default object’s entitlement is defeasible by discretion or some other contingency.¹¹⁸

¹¹⁶ See eg: Nolan, ‘Invoking the Administrative Jurisdiction’ (n33) 167–69, arguing that an object of an exhaustive power might be able to seek relief but that the object of a non-exhaustive or mere power may not.

¹¹⁷ See eg: Smith, ‘Massively Discretionary Trusts’ (n32) 22, arguing that only beneficiaries in the ‘narrow sense’ of being now (or in the future, such as in default of appointment) absolutely entitled, can seek relief.

¹¹⁸ See also: *Kennon v Spry* (2008) 238 CLR 366 [60]–[62] (French CJ); A Mason, ‘Discretionary Trusts and Their Infirmities’ (2014) 20 T&T 1039, 1045.

Once regard is had to the role of discretion (or some other future contingency) in determining the existence of an object’s entitlement, it can be seen that a default beneficiary in category (ii) can have an entitlement, which in substance, is *just as contingent, speculative and remote as that of a mere object of a non-exhaustive power, or object of an exhaustive power*. Thus, the categories relied upon by the narrow approach do not provide a meaningful indication of the availability of equitable relief.

Mercanti v Mercanti,¹¹⁹ discussed above in Part B.2.iii, illustrates the point. The plaintiffs were part of a class of mere objects (category (iv)) *and* part of the objects entitled in default of appointment (category (ii)). This case could be marshalled in support of the narrow approach as it demonstrates the availability of relief to objects entitled in default of appointment. This thesis is critical of that approach as it relies on a formal characterisation and ignores the substantive effect of the trust terms. According to those terms, the trustee had an obligation to distribute the capital and income after the vesting day. *However, this obligation was to exercise a discretionary power to choose to whom among the default objects a distribution(s) would be made.*¹²⁰

To the extent that the plaintiffs in *Mercanti v Mercanti* could be said to have a future entitlement to the benefit of trust property as default objects, that interest was: (i) subject to not being extinguished by a discretionary power *prior* to the vesting date; *and* (ii) dependent for its creation on the exercise of the discretion on or after the vesting date. Discretion played a role in the *extinction and creation* of the plaintiffs’ entitlements. Further, the plaintiffs did not represent the entire class of objects entitled in default under the exhaustive power, and they could not be said to have been absolutely entitled on a collective basis. Thus, it is submitted that the plaintiffs’ interests in this case were in substance just as remote, speculative and contingent *as the mere objects* in *Curwen v Vanbreck Pty Ltd*,¹²¹ discussed in Part B.2.iv above.

¹¹⁹ *Mercanti* (n34), for a summary of the trust terms, see [30]–[42]; special leave to appeal refused in *Mercanti* (n36).

¹²⁰ *Mercanti* (n34) [34].

¹²¹ *Curwen* (n43).

Again, in *Montevento Holdings Pty Ltd v Scaffidi*, a plaintiff who did *not* have ‘a vested interest in the capital or income of the trust fund’¹²² was able to maintain proceedings seeking the removal and replacement of a trustee consequent upon an excessive exercise of power.¹²³ The plaintiff in this case was entitled in default of appointment with other beneficiaries to equal shares at the ‘Termination Date’.¹²⁴ Thus, *Montevento Holdings* could also be marshalled in support of the narrow approach as demonstrating the availability of equitable relief to objects entitled in default of appointment (category (ii)). Again, this thesis is sceptical of such an approach given the role of discretion in determining the existence and extent of the plaintiff’s entitlement. That entitlement *was defeasible at the discretion of either the trustee, appointor or guardian under the trust*. The trustee had a discretion, prior to the Termination Date, whether to distribute property, and could have decided to exhaust the trust fund prior to the Termination Date, leaving no property available to the plaintiff. Further, the plaintiff could have been excluded from the class of default beneficiaries altogether by the trustee.¹²⁵ The plaintiffs’ entitlement to the benefit of trust property was, in substance, just as remote and speculative as a mere object, once regard is had to the role of discretion in determining the continued existence, and not just the creation, of the plaintiff’s entitlement.

In summary, the narrow approach relies upon categories (ii)–(iv) as presenting meaningful points of distinction to assess the certainty and stability of an object’s entitlement to the benefit of trust property, and the object’s consequent ability to seek equitable relief. However, the discussion has shown that these categories and distinctions are less real than apparent once regard is had to the role of discretion in extinguishing and varying an object’s entitlement. The narrow approach is premised upon a non-existent distinction.

Finally, *if* this argument is accepted, then a further implication follows. Having regard to the speculative nature of the objects’ entitlements in *Mercanti v Mercanti* and *Montevento Holdings Pty Ltd v Scaffidi*, these cases provide some further

¹²² *Montevento Holdings Pty Ltd v Scaffidi* (2012) 246 CLR 325 [7] (the Court).

¹²³ *Montevento Holdings* (n122). For a summary of the relevant trust terms, see *Scaffidi v Montevento Holdings Pty Ltd* [2011] WASCA 146 [25]–[58], [125]–[135].

¹²⁴ *Scaffidi* (n123) [126].

¹²⁵ *Scaffidi* (n123) [39], [122].

support for this Chapter’s argument in Part B above, that an object can assert some entitlement to relief in respect of an express trust, including the beneficiary’s proprietary claim, irrespective of the speculative nature of her interest. Indeed, in *Montevento Holdings*, the High Court of Australia expressly acknowledged the limited nature of the plaintiffs’ interest,¹²⁶ and yet the plaintiffs’ ability to maintain the proceedings was not questioned.

D. Conclusion

This Chapter has argued that the equity for relief asserted by the beneficiary’s proprietary claim accrues to any object of an express trust, as well as someone interested in a charitable trust, with leave of the court, and a trustee, collectively referred to as ‘B’. Support for this argument is drawn from cases demonstrating the availability of the claim, and the beneficiary principle. The beneficiary principle defines when B can, and cannot, assert the beneficiary’s proprietary claim. The assessment of whether a given beneficiary or object will be permitted to assert the beneficiary’s proprietary claim is not formulaic according to the label attributed to the nature of that person’s entitlement to the benefit of trust property. Rather, a substantive assessment is undertaken to determine whether permitting B to pursue her claim will permit the control of power held under an express trust.

¹²⁶ *Montevento Holdings* (n122) [7], [15].

Chapter 8 – Defences, denials and equitable discretion

A. Introduction

This Chapter considers the range of defences, denials and equitable discretionary factors applicable to the beneficiary's proprietary claim. It is sometimes thought that the range is limited to the plea of bona fide purchaser,¹ and that B's claim is not subject to equitable discretionary factors.² With respect to these views, a different position is advocated in this thesis as to the relationship between the beneficiary's proprietary claim and discretionary factors. This Chapter will show that there is a range of defences, denials and equitable discretionary factors available to X to defeat B's claim. Equitable discretion *does* have a role to play in this context. The purpose is to show that B's equity, like any other claim for equitable relief, is not an absolute right to relief. The availability and form of the relief available to B will depend not only on B's claim but on the court's assessment of the position of X and B, and potentially third parties. The applicability of discretionary factors furthers this thesis' argument that B's claim is not a matter of 'hardnosed property rights'.³

In so doing, this Chapter will consider whether the change of position defence is applicable to the beneficiary's proprietary claim. It will be argued that, as a matter of positive law, the change of position defence is not applicable to the beneficiary's proprietary claim. The inapplicability of change of position thus informs this thesis' account of the nature and function of the claim in Chapter 9, and the consideration of the question whether the defence *should* apply in Chapter 10.

¹ See eg: *Foskett v McKeown* [2001] 1 AC 102, 108–09 (Lord Browne-Wilkinson), 127–29 (Lord Millett); *K & S Corp Ltd v Sportingbet Australia* (2003) 86 SASR 312 [157] (Besanko J); *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 [251] (the Court); W Swadling, 'The Nature of Knowing Receipt' in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 309.

² *Foskett* (n1) 109 (Lord Browne-Wilkinson), 127 (Lord Millett).

³ *Foskett* (n1) 109 (Lord Browne-Wilkinson).

This Chapter will proceed as follows. Part B will set out the range of defences, denials and equitable discretionary factors applicable to the beneficiary's proprietary claim. Part C will demonstrate that, as a matter of positive law, the change of position defence is not part of this range.

B. Denials, defences and equitable discretionary factors

This Part B demonstrates that, contrary to previous views,⁴ there is a range of defences, denials and equitable discretionary factors applicable to the beneficiary's proprietary claim. The significance is that this shows that B's equity for relief, like any other equity for relief, depends on the court's assessment of all its suitors by reference to a construct of values and standards.⁵ Equitable discretion has a role to play in this context. However, that role is more limited when compared to the role played by equitable discretion in other areas. The limited role of equitable discretion in the context of the beneficiary's proprietary claim provides a basis on which to contextualise and reconcile previous case authority to the effect that discretion has no role to play in relation to B's claim.

The further significance of the role of discretion in the context of the beneficiary's proprietary claim is that it counters the proprietary rights account of the claim. Part B.3 below will show that B's equity for relief is subject to equitable discretion and thus B's equity does not assert an absolute right in relation to specific property. For the reasons discussed in Chapter 2,⁶ this is one reason why the proprietary rights account is flawed.

To make out these arguments, this Part B will: (i) explain the conceptual framework according to which the regime of defences, denials and equitable discretionary factors is assessed (Part B.1); (ii) consider the defences and denials applicable to the beneficiary's proprietary claim (Part B.2); (iii) demonstrate the applicability of equitable discretionary factors to the beneficiary's proprietary claim (Part B.3); and

⁴ See n1.

⁵ *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 [15]–[18] (the Court), referring to W Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Clarendon Press 1999) 44–51; J Campbell, 'When and Why a Bribe Is Held on a Constructive Trust: The Method of Reasoning towards an Equitable Remedy' (2015) 39 ABR 320, 325–30.

⁶ Chapter 2, Parts C.2–3.

(iv) compare the role of equitable discretionary factors in this context with other equitable claims, such as equitable estoppels (Part B.4).

1. Conceptual framework

This Part B.1 sets out how this thesis uses the labels ‘defences’, ‘denials’ and ‘equitable discretionary factors’, as these labels can have different meanings.

i. Defences and denials

Drawing on the terminology used and distinctions made by other scholars,⁷ this thesis distinguishes between the following three phenomena. First, there is a *denial* which is an argument X can make that, if made out, will negate one, or more, of the elements of B’s claim. Second, there is a *defence* which assumes that B’s claim is made out, and provides an argument why X should nonetheless not be liable. Third, there are principles that reduce or change the relief available to B, despite her having established her claim. Some equitable discretionary factors operate in this way when they result in a different or lesser remedy, as opposed to barring B’s claim altogether, and are discussed next.

ii. Equitable discretionary factors

There is a distinction between *equitable discretionary bars to relief* and *equitable discretionary factors*.⁸ The distinction is not absolute as some principles appear in both categories. The former refers to equitable doctrines that define discrete principles upon which a court in its discretion may refuse to grant relief to B *against* X, despite B having otherwise made out her claim. Examples include laches, acquiescence and unclean hands. *Equitable bars to relief* can be understood as defences in the sense set out above, because they provide a reason why B’s claim against X should not succeed, despite B having made out the elements of the claim. However, they are dealt with separately in this Chapter as they are distinguishable from the other defences on the basis that equitable bars to relief permit a role for

⁷ See eg; J Goudkamp, *Tort Law Defences* (Hart Publishing 2013) 1–7; J Goudkamp and C Mitchell, ‘Denials and Defences in the Law of Unjust Enrichment’ in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Comparative and Critical Essays* (Hart Publishing 2013) 137–39.

⁸ E Bant and M Bryan, ‘Defences, Bars and Discretionary Factors’ in E Bant and M Bryan (eds), *Principles of Proprietary Remedies* (Thomson Reuters 2013) 185–87.

the court’s discretion in balancing ‘justice and injustice in taking one course or the other, so far as relates to the remedy’.⁹

Equitable discretionary factors apply equitable principles to another facet of the court’s discretion: the form of relief necessary to satisfy B’s equity, and the terms on which relief is granted.¹⁰ Examples include third-party interests and (again) unclean hands. Broadly speaking, equitable discretionary factors fit into the third conception of a defence, mentioned above in Part B.1.i, which reduces or changes the type of relief awarded against X. As mentioned already, there is a degree of conceptual and doctrinal overlap, as some doctrines can operate as discretionary bars to relief and discretionary factors relevant to the form of relief. Third-party interests, for example, might operate as a bar to B’s claim altogether, or can result in the court ordering a different type of remedy.

2. Regime applicable to the beneficiary’s proprietary claim

i. Defences

This Part B.2.i considers the defences applicable to the beneficiary’s proprietary claim and demonstrates the applicability of other defences in addition to the plea of bona fide purchaser.

a. *Bona fide purchaser*

It is sometimes said¹¹ that the only defence applicable to the beneficiary’s proprietary claim is the plea of bona fide purchaser of the legal estate for value without notice.¹² When made out, this plea is absolute and will defeat B’s claim

⁹ *Lindsay Petroleum Co v Hurd* (1894) LR 5 PC 221, 239–40 (the Board).

¹⁰ See generally: Campbell (n5) 325–30; S Smith, ‘Form and Substance in Equitable Remedies’ in A Robertson and M Tilbury (eds), *Divergences in Private Law* (Hart Publishing 2016).

¹¹ See n1.

¹² *Great Investments Ltd v Warner* (2016) 243 FCR 516 [103]–[108] (the Court); *Akers v Samba Financial Group* [2017] AC 424, [45], [51] (Lord Mance), [89] (Lord Sumption); *Pilcher v Rawlins* (1872) LR 7 Ch App 259 266 (Lord Hatherley LC), 269 (James LJ). See generally: J Heydon, M Leeming and P Turner, *Meagher, Gummow & Lehane’s Equity: Doctrines & Remedies* (5th edn, LexisNexis 2015) [8-240]ff; D Fox, ‘The Bona Fide Purchaser for Value Without Notice’ in J McGhee (ed), *Snell’s Equity* (33rd edn, Sweet & Maxwell 2015) [4-017]. Notice may be affected by statutory regimes in relation to land.

irrespective of whether the amount of consideration paid by X accords with the value of the property. The association between the claim and the plea of bona fide purchaser is such that they are often referred to as the same phenomenon,¹³ and might tend to the view that only the plea of bona fide purchaser might impact upon B's claim.

However, this is not so and the rest of this Part B will show that there is a varied and nuanced regime of defences, denials and equitable discretionary factors that apply to bar or vary B's equity for relief. As Lord Sumption observed in *Akers v Samba Financial Group*, '[t]here are a number of reasons why [B's interest] ... may not be effective or enforceable'.¹⁴ The broader significance of this is that it demonstrates that B's equity, like any other equity for relief, is not a matter of hardnosed property rights, but is subject to the court's assessment of 'all the suitors before the court' in accordance with its 'common standard of civil right'.¹⁵ Before moving on to the other defences, denials and discretionary factors, it is useful to consider how the plea of bona fide purchaser itself demonstrates this point.

Sometimes the rationale for the plea is expressed in terms of security of receipt, that is, to assist in providing a secure means of transfer and ascertaining title to particular forms of property.¹⁶ However, there are additional rationales for the plea, which reflect equity's broader commitment to act in accordance with the court's assessment of *all its suitors*.¹⁷ In particular, whether relief should be granted against X.¹⁸ The plea provides a reason to prefer X's title over B's claim. X has satisfied equity's 'common standard of civil right', so that X's conscience is clear.

¹³ *Grimaldi* (n1) [251] (the Court); *Foskett* (n1) 129 (Lord Millett); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 [106] (Lloyd LJ); *Akers* (n12) [51] (Lord Mance).

¹⁴ *Akers* (n12) [83] (Lord Sumption).

¹⁵ J Pomeroy, *A Treatise on Equity Jurisprudence* (5th edn, Bancroft-Whitney & Lawyers Cooperative 1941) vol 1, 74, quoted in *Kakavas* (n5) [15].

¹⁶ *Great Investments* (n12) [106] (the Court); D Fox, *Property Rights in Money* (OUP 2008) ch 8.

¹⁷ *Kakavas* (n5) [16] (the Court).

¹⁸ *Akers* (n12) [89] (Lord Sumption); *Pilcher* (n12) 269 (James LJ). I have made a similar observation before: J Hudson, 'Who is Equity's Darling? Recipient Trustees as Bona Fide Purchasers' [2017] Conv 195.

The last point to note before moving on is the operation of the plea on B's interest, as some cases suggest that the plea destroys or extinguishes B's interest.¹⁹ It is submitted that the better understanding is that the plea is concerned with whether relief should be awarded *against the particular defendant*, and does not extinguish B's claim altogether.²⁰ The plea does extinguish B's claim in relation to the subject property held by *the party who can make out the plea*, and that party's successors in title. However, B would be able to pursue another party who might retain other property that qualifies for the claim, such as a traceable substitute.²¹ In the cases suggesting that B's interest would be extinguished, the courts did not need to consider whether B could assert her claim against someone else. These cases should be understood as referring to B's interest being extinguished as against the specific party who can raise the plea (and that party's successors in title).

b. Estoppels, election and waiver

In addition to the plea of bona fide purchaser, there are other equitable doctrines that may apply to bar B's claim. For example, X may be able to raise an estoppel against B, which would bar B's claim.²² This is shown by *Svenson v Payne*, where the English High Court indicated that the beneficiary's proprietary claim could in principle be barred by an estoppel, although it was not made out on the facts.²³ Election and waiver are further doctrines which, in addition to estoppel, have been recognised as applicable to bar B's claim based on B's conduct.²⁴

Before moving on to denials, it is important to point out the range of other defences that are available and that further demonstrate that the plea of bona fide purchaser is not the only applicable defence or denial to the beneficiary's proprietary claim.

¹⁹ *Akers* (n12) [65]–[66] (Lord Neuberger); *Re Diplock* [1948] Ch 465, 539 (the Court).

²⁰ *Independent Trustee Services* (n13) [62] (Patten LJ), [113] (Lloyd LJ). I have made this point elsewhere: *Hudson* (n18) fn 86, and accompanying text.

²¹ As the case was in *Fistar v Riverwood Legion & Community Club Ltd* (2016) 91 NSWLR 732 [41], [81].

²² In principle, the beneficiary's proprietary claim was considered subject to these equitable discretionary bars in: *Shropshire Union v R* (1865) LR 7 HL 496, 508–10 (Lord Cairns LC), 512 (Lord Hatherley); *Mallott v Wilson* [1903] 2 Ch 494, 504 (Byrne J); *Orr v Ford* (1989) 167 CLR 316, 329–32 (Wilson, Toohey and Gaudron JJ), 337–46 (Deane J).

²³ *Svenson v Payne* (1945) 71 CLR 531, 541–43 (the Court).

²⁴ *Orr* (n22) 329–32 (Wilson, Toohey and Gaudron JJ), 337–46 (Deane J).

This contributes to this thesis' argument by demonstrating that there is a complex defences regime that represents a nuanced range of norms protecting X's interests. This is important for this thesis' arguments in relation to change of position in Part C below.

c. Statutory defences

One statutory defence is the statutory limitation period(s). Allowing for jurisdictional variances, generally speaking, B's claim will be barred after the passage of a defined period of time from a specific date.²⁵ That date might be when B discovers the facts giving rise to the claim, or some other date nominated in the applicable statutory regime.

Some of the arguments in this thesis may have future significance for the interpretation and application of statutory limitation periods. This thesis advocates the view that B's interest asserted by the claim arises in response to the event of non-compliant execution.²⁶ One implication is that B's claim to the original property should not be exempt from statutory limitation simply on the basis that it is a claim that vindicates priority of title.²⁷

Another implication is that the date from when B's action accrues for limitation purposes is not the date when B acquires an interest under the trust but the date when there is a non-compliant exercise of power. Further, the date from when B acquires requisite knowledge for time to run might vary, having regard to the facts that demonstrate a non-compliant execution, rather than a breach of trust, for example. Another implication of the analysis in this thesis is that X may not be a 'trustee' in the sense necessary to engage exemptions from statutory limitation

²⁵ See eg: Limitation Act 1969 (NSW) s 47(1); Limitation Act 1980 (Eng) s 21(3), although there are divergent academic opinions about the application of the English statutory regime to B's claim, see eg: L Tucker, N Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) [44-067]–[44-068]; C Mitchell, D Hayton and P Matthews, *Underhill & Hayton: Law of Trusts and Trustees* (19th edn, LexisNexis 2016) [94.15]; S Worthington, 'Exposing Third-Party Liability in Equity' in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 350–52.

²⁶ Chapter 4, Part C.

²⁷ Cf Worthington (n25) 350–52.

periods that apply to the recovery of trust property from a ‘trustee’.²⁸ Further exploration of these issues is beyond the scope of this thesis.

Another statutory defence is indefeasibility of registered title to land.²⁹ The effect of statutory indefeasibility is that X’s title to land is ‘absolutely free from all other estates and interests’.³⁰ Cases have previously treated indefeasibility as a bar to the beneficiary’s proprietary claim.³¹ There are exceptions to indefeasibility, such as where X acquires her registered title by actual fraud,³² and the *in personam* exception.³³ Having regard to this thesis’ account of the conditions for, and nature of, X’s responsibility in Chapter 6, the facts necessary to establish the beneficiary’s proprietary claim will not of themselves satisfy the fraud exception.

In relation to the *in personam* exception, this applies where the registered title holder *by her conduct* creates an equity in favour of a plaintiff.³⁴ It is unlikely that the facts necessary to make out the beneficiary’s proprietary claim, without more, will be sufficient to demonstrate *conduct on X’s part* that engages the *in personam*

²⁸ See eg: Limitation Act 1980 (Eng) ss 21(1), 38(1), although the same outcome may be reached in light of *Williams v Central Bank of Nigeria* [2014] AC 1189 [26]–[31] (Lord Sumption), [49]–[57], [90] (Lord Neuberger). See further: Worthington (n25) 350–52.

²⁹ See eg: Real Property Act 1900 (NSW) s 42(1). In England, if X acquires a legal estate in land, X may be able to rely on registered title (Land Registration Act 2002 (Eng); *Underhill & Hayton* (n25) [99.59]; M Conaglen and A Goymour, ‘Knowing Receipt and Registered Land’ in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) ch 5), or on statutory overreaching provisions, as in *City of London Building Society v Flegg* [1988] AC 54; see eg: Trusts of Land and Appointment of Trustee Act 1996 (Eng) s 6(1); *Underhill & Hayton* (n25) [99.24]; B McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 394–404; C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012). There may be uncertainty whether these provisions would be available where there is a non-compliant exercise of power, although this is left for another day, see eg: C Harpum, ‘Overreaching, Trustees’ Powers and the Reform of the 1925 Legislation’ (1990) 49 CLJ 277, 294–96.

³⁰ Real Property Act 1900 (NSW) s 42(1).

³¹ *Perpetual Trustee Co Ltd v Cowan (No 2)* (1900) 21 LR (NSW) Eq 278, 301 (the Court); *Stuart v Kingston* (1923) 32 CLR 309, 331 (Knox CJ), on appeal B’s claim was defeated by X’s plea of bona fide purchaser and indefeasibility of title was not considered (1924) 34 CLR 394; *Palmer v Monk* [1962] NSW 786, 791 (Jacobs J).

³² Real Property Act 1900 (NSW) s 42(1).

³³ See eg: *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ); *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 638 (Wilson and Toohey JJ).

³⁴ See eg: *Breskvar* (n33) 385 (Barwick CJ); *Bahr* (n33) 638 (Wilson and Toohey JJ).

exception to X's indefeasibility of title. Chapters 3 and 4 have shown that the event relevant to the beneficiary's proprietary claim, a non-compliant execution, concerns the conduct of T/D, not X. Further, X's receipt has been found to be insufficient to raise the *in personam* exception in relation to: (i) a claim in knowing receipt, even where knowledge is acquired *after* registration;³⁵ and (ii) a claim against a volunteer recipient of stolen property.³⁶ These cases suggest that the facts required to make out the beneficiary's proprietary claim will be unlikely to raise the *in personam* exception to X's indefeasibility of title.

d. Illegality

Finally, there is illegality, which has been recognised as applicable, in principle, to defeat B's claim.³⁷ There has been some flux in authority in Australia³⁸ and England,³⁹ and the focus of concern for illegality has shifted away from the question whether a plaintiff relies upon her own illegal conduct in making out her claim for relief, to a broader policy-based test. Accepting that illegality is in principle available, it is submitted that it might be difficult for X to successfully make out this defence having regard to the structural intersections between the defence and B's claim.

The beneficiary's proprietary claim is not concerned with B's conduct, but rather with a non-compliant exercise of power by T, and X's retention of the subject property. To the extent that illegality operates upon the *plaintiff's* 'illegal' conduct as relevant to the *plaintiff's* claim, there are arguably only a narrow range of

³⁵ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [193]–[198] (the Court); *Super 1000 v Pacific General Securities* [2008] NSWSC 1222 [219] (White J).

³⁶ *Break Fast Investments Pty Ltd v Giannopoulos* [2011] NSWSC 1508 [102]–[103] (Black J), approved in *Sze Tu v Lowe* (2014) 89 NSWLR 317 [243]. See also: [241]–[242] (Gleeson JA; Meagher and Barrett JJA agreeing).

³⁷ *Strang v Owens* (1925) 42 WN (NSW) 183, 184–85 (Street CJ; Long Innes J agreeing), special leave refused *Owens v Strang* (1925) 37 CLR 593 (note).

³⁸ *Nelson v Nelson* (1995) 184 CLR 538, 570–71 (Deane and Gummow JJ), 595–97 (Toohey J), 609 (McHugh J).

³⁹ *Patel v Mirza* [2017] AC 467 [110]–[121] (Lord Toulson; Baroness Hale, Lord Kerr, Lord Wilson and Lord Hodge agreeing). See generally: J Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 LQR 14; A Burrows, 'Illegality after *Patel v Mirza*' (2017) 70 CLP 55.

circumstances in which illegality could be made out by X. Even if illegality is made out (for example, if an express trust has been created for an illegal purpose), then *Nelson v Nelson*⁴⁰ suggests that any illegal purpose motivating the creation of an express trust tends towards relief being granted on terms, as opposed to denying B any relief at all.⁴¹ Thus, while illegality might be available in principle, in practice it may be difficult to establish, and may have a limited impact on the beneficiary's proprietary claim.

ii. Denials

This Part B.2.ii considers the denials applicable to the beneficiary's proprietary claim. Recall that a denial is distinguished from a defence by the way it operates. A denial operates to negate an element of B's claim.

a. No retention

One example, which was discussed in Chapter 6, is the scenario where X has received, but no longer retains, the subject property. As recognised by Lord Sumption, an '[o]bvious example' where the claim is unenforceable is where the subject property has been 'consumed or destroyed or has ceased to be traceable'.⁴² This denial of no retention is exemplified in cases like *Re Montague Settlement* where, despite B being able to show that X did at one stage receive trust property (or its traceable substitute), X nonetheless was not liable because she did not actually have the property at the time of judgment.⁴³

b. Equity's standards are satisfied and consent

Even where X does have property which was settled on trust (or its traceable substitute), X can deny B's claim by showing that the property X retains was dealt with in a manner that complies with equity's standards. To do this, X would need to show that the dealing with property was within the trust terms, in good faith and for a proper purpose.

⁴⁰ *Nelson* (n38) 570–71 (Deane and Gummow JJ).

⁴¹ Subject to the illegal purpose not invalidating the express trust, and B's claim, albeit B or the settlor may have a claim based upon a resulting trust, see eg: *Nelson* (n38).

⁴² *Akers* (n12) [82] (Lord Sumption).

⁴³ *Re Montagu's Settlement Trusts* [1987] 1 Ch 264.

Alternatively, X might show that B consented to the impugned exercise of power. Consent can operate in different ways: sometimes as an equitable discretionary factor (considered further below) and sometimes as a denial. As a denial, B's consent changes the trustee's power to deal with the trust property so that the execution is in compliance with the trust terms.⁴⁴ In this sense, consent is a denial that X can raise, because it will negate one of the elements of B's claim.

iii. Trustee exemption clauses and statutory exoneration

Finally, there are trustee exemption clauses and statutory exoneration provisions. In this analysis, these clauses and statutory provisions are treated separately from the other defences and denials as they can operate in different ways: sometimes as a defence to liability and sometimes as a denial to an element of a claim.

If, contrary to this thesis, one of the elements of the beneficiary's proprietary claim is breach of trust or trustee wrongdoing, then a trustee exemption clause might operate to bar the beneficiary's proprietary claim, by removing either the duty altogether or T's liability for breach. A clause that removes T's underlying duty will mean there is no duty to breach in the first place, and deny a claim by B that is predicated upon T's breach.

However, as demonstrated by Chapter 5, a breach of trustee's duty is not an element of the beneficiary's proprietary claim. Thus an exemption or exclusion clause that *removes T's duty* will not affect the availability of B's claim. As Chapter 4 has shown, the event relevant to the claim is a non-compliant execution. Further, a clause that *removes liability for breach* of a duty will not impact upon the application of, and compliance with equity's standards. It is likewise for statutory exoneration provisions⁴⁵ that allow a court to excuse a trustee from personal liability for *breach of a duty*. These statutory provisions have no impact on the beneficiary's proprietary claim.

Further, on this thesis' account of the claim, it may be very difficult for an exemption clause to preclude or remove the beneficiary's proprietary claim, no matter how it is drafted. As mentioned above, the beneficiary's proprietary claim

⁴⁴ Y Liew and C Mitchell, 'Beneficiaries' Consent to Trustee's Unauthorised Acts' in P Davies, S Douglas and J Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 82–83.

⁴⁵ See eg: Trustee Act 1925 (NSW) s 85; Trustee Act 1925 (Eng) s 61. See generally: *Underhill & Hayton* (n25) [93.1]–[93.25].

arises in response to a non-compliant execution, which is an exercise of power that fails to meet equity's standards. For X to deny B's claim on the basis of an exemption clause, the clause would have to remove application of equity's standards. However, it is unlikely that such a clause would be valid and effective. Equity's standards are mandatory as they give effect to the essential feature of an express trust, as shown in Chapter 3.⁴⁶ A clause purporting to remove one or more of equity's standards may be viewed as an attempt to undermine the essential feature of an express trust, and thus be rendered invalid.⁴⁷

This Part B.2 has shown the range of defences to and denials of the beneficiary's proprietary claim, which operate in addition to the plea of bona fide purchaser. Part B.3 will turn to the role of equitable discretionary factors and bars to relief in this context.

3. Equitable discretionary bars and factors

This Part B.3 demonstrates the applicability of equitable discretionary factors and bars to relief to the beneficiary's proprietary claim. As acknowledged already, strong judicial statements have been made to the effect that discretion has no application to the beneficiary's proprietary claim. For example, in *Foskett v McKeown*, Lord Millett stated '[p]roperty rights are determined by fixed rules and settled principles. They are not discretionary.'⁴⁸ Lord Browne-Wilkinson in the same case stated, '[t]here is no discretion vested in the court', going on to say '[i]t is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. ... It is a case of hard-nosed property rights.'⁴⁹ These statements have since been relied on in finding that relief in response to the beneficiary's proprietary claim is not subject to discretionary factors.⁵⁰

A different position is advocated in this thesis as to the relationship between the beneficiary's proprietary claim and discretionary factors. This Part B.3 will show

⁴⁶ Chapter 3, Parts E.2–3.

⁴⁷ *Armitage v Nurse* [1998] Ch 241, 253–54 (Millett LJ).

⁴⁸ *Foskett* (n1) 127 (Lord Millett).

⁴⁹ *Foskett* (n1) 109 (Lord Browne-Wilkinson).

⁵⁰ See eg: *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 [1522] (Lewison J); *Gadson v Gadson* [2003] WASC 48 [86] (Pullin J).

that discretionary factors *do* have a role to play by: (i) delineating the stages of inquiry to which discretion may be relevant (Part B.3.1); and (ii) showing the range of equitable discretionary factors and bars to relief that are applicable to the beneficiary's proprietary claim (Part B.3.ii). Part B.4 below will go on to explain how the role for equitable discretion is more limited when compared to other equitable claims for relief.

i. The stages of inquiry to which discretion may be relevant

Before demonstrating the role of equitable discretion in the context of the beneficiary's proprietary claim, it is first necessary to identify the discrete stages of inquiry that arise once B has made out the elements of the beneficiary's proprietary claim, and to which equitable discretion might be relevant.

Once B has made out her equity for relief, the court must consider: (i) the extent of B's equity for relief; (ii) whether any relief will be awarded against X in particular; and (iii) the form of relief considered necessary to satisfy the equity raised.⁵¹ By distinguishing these different inquiries, it is possible to identify precisely the role and relevance of equitable discretionary factors and bars to relief. Part B.3.ii next will demonstrate the role of equitable discretion in relation to inquiries (ii) and (iii). However, as discussed in the following Part B.4, equitable discretion is not relevant to the question of the extent of B's equity for relief.

ii. The range of equitable discretionary factors and bars to relief applicable to the beneficiary's proprietary claim

This Part B.3.ii demonstrates the applicability of a range of equitable discretionary factors and bars to relief, and the stage(s) of inquiry to which they are relevant.

a. *Laches and acquiescence*

The role of equitable discretion in informing the court's assessment whether to award relief against X (inquiry (ii)) is shown by cases⁵² recognising the applicability

⁵¹ *Boscawen v Bajwa* [1996] 1 WLR 328, 334–35 (Millet LJ).

⁵² In addition to the cases discussed next in this Part B.3, laches and/or acquiescence were also recognised as potential available bars to B's claim in: *Harper v Brown* (1884) 8 LR (NSW) Eq 86 (Manning PJ), 107, *affd* on appeal including in relation to the potential application of laches, waiver or consent [1887] NSWLR 116, 121 (the Court); *Shropshire Union* (n22) 506 (Lord Cairns LC), 512 (Lord Hatherley), 514 (Lord O'Hagan agreeing).

of the equitable discretionary factors of laches and acquiescence, either of which might bar B's claim for relief against X. Laches is not concerned with mere delay,⁵³ but with circumstances where a plaintiff, 'by her conduct and neglect ... put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted'.⁵⁴

Laches was recognised by the High Court of Australia in *Orr v Ford* as applicable to bar the beneficiary's proprietary claim where B's delay leads to the destruction of evidence that would have assisted X in defending her case.⁵⁵ Laches was considered capable of barring the beneficiary's proprietary claim in *Pearce v Newlyn*,⁵⁶ albeit it was not made out on the facts in *Orr* and *Pearce*. Finally, laches and acquiescence did bar a beneficiary's claim to recover property *against T*, in *Hourigan v Trustees, Executors & Agency Co Ltd*.⁵⁷ These cases clearly demonstrate that laches can apply to bar the beneficiary's proprietary claim.

B's delay, and conduct in standing by, may engage other discretionary bars, such as acquiescence where B's conduct amounts to 'contemporaneous and informed ('knowing') acceptance or standing by which is treated by equity as 'assent' (ie consent) to what would otherwise be an infringement of rights'.⁵⁸ In *Orr v Ford*,

⁵³ *Re Eustace* [1912] 1 Ch 561, 565 (Swinfen Eady J).

⁵⁴ *Lindsay Petroleum Co* (n9) 240 (the Board).

⁵⁵ *Orr* (n22) 323 (Mason CJ), 329–32 (Wilson, Toohey and Gaudron JJ), 337–46 (Deane J). Mason CJ and Deane J, in dissent, found that laches was made out on the facts.

⁵⁶ *Pearce v Newlyn* (1818) 3 Madd 186, 189 (Sir John Leach), where laches was considered as potentially applying to defeat the beneficiary's proprietary claim but not raised on the facts.

⁵⁷ *Hourigan v Trustees, Executors & Agency Co Ltd* (1934) 51 CLR 619, 629 (Rich J), 651 (Dixon J).

⁵⁸ *Orr* (n22) 337 (Deane J). Sometimes acquiescence is used to refer to: (i) estoppel by conduct, where B's silence, inaction or standing by amounts to a representation by B; (ii) B's waiver rights; or (iii) laches, as referred to above in Part B.3.ii.a. These are not congruent concepts, but they may arise from the same set of facts and are sometimes discussed or considered together in case law. The imprecision with which the labels in this area have been used has been acknowledged before, and it is not relevant for this analysis to go further into the distinctions between acquiescence, waiver, consent and estoppel: *Orr* (n22) 337–46 (Deane J). See also: *Byrnes v Kendle* (2011) 243 CLR 253 [126]–[140] (Heydon and Crennan JJ).

Deane J indicated that B's conduct could amount to acquiescence which would also disentitle B to relief.⁵⁹

It is acknowledged that in addition to comments such as those in *Foskett v McKeown*, there are other judicial statements suggesting that laches and acquiescence cannot apply, or that only 'gross laches' would suffice.⁶⁰ However, these statements were made in relation to B's claim *against T, not X*. These statements reflect the fact that B is under no obligation to monitor T, so that any claim by B against T cannot be barred simply by her conduct in allowing the trustee to have title to property and B's conduct in not monitoring the trustee's conduct. These cases should be understood as an application of the specific principle that B's conduct in allowing T to retain trust property will not count against B.⁶¹ These cases do *not* otherwise support the more general proposition that B's conduct can never count against her at all. The case law discussed above makes clear that the beneficiary's proprietary claim, like any other equitable 'right', is subject to equitable discretionary factors,⁶² such as laches and acquiescence.

b. B's disentitling conduct

There is a group of cases⁶³ that demonstrate that equitable discretion applies to determine when the interest asserted by B's claim might be deferred in priority to a later equitable interest, for example, on the basis of B's disentitling conduct.⁶⁴ Broadly speaking, 'disentitling conduct' refers to B's conduct that means it will not be inequitable to deny B's claim. In *Fung v Tong*, B's prior equitable interest under a trust was deferred in priority to a later equitable mortgage on account of B's

⁵⁹ *Orr* (n22) 329–32 (Wilson, Toohey and Gaudron JJ), 337–46 (Deane J).

⁶⁰ See eg: *Re Cross*; *Harston v Tenison* (1882) 20 Ch D 109, 121 (Baggallay LJ).

⁶¹ *Shropshire Union* (n22) 509 (Lord Cairns LC), 511–12 (Lord Hatherley); *Cory v Eyre* (1863) 1 De GJ & S 149, 169 (Turner LJ).

⁶² See eg: *Grimaldi* (n1) [503] (the Court); W Gummow, 'Equity: Too Successful?' (2003) 77 ALJ 30, 40–41.

⁶³ See eg: *Shropshire Union* (n22) 506–09 (Lord Cairns); *Taylor v London & County Banking Co* [1901] 2 Ch 231, 261–62 (Stirling LJ); *Powell v London & Provincial Bank* [1893] 1 Ch 610, 617 (Wright J), *affd* on appeal [1893] 2 Ch 555.

⁶⁴ See generally: *Rice v Rice* (1853) 2 Drew 73, 78–79 (Sir Kindersley VC); *Lapin v Abigail* (1930) 44 CLR 166, 196–97 (Duffy and Starke JJ), 204–05 (Dixon J); *Moffett v Dillon* [1999] 2 VR 480 [77] (Ormiston JA).

conduct.⁶⁵ These cases concerning equitable priorities further demonstrate the application of discretionary factors to bar B's claim and in particular to the question whether to award B relief *against X in particular* (inquiry (ii)).

c. B's consent

As discussed above in Part B.2.ii.b, consent can operate as a denial; but it can also operate as a discretionary bar to relief where B's consent, in all the circumstances, means that it would not be 'fair and equitable to allow [B] ... to sue [X]'.⁶⁶ This discretionary factor was considered applicable to bar the beneficiary's proprietary claim in *Eaves v Hickson*,⁶⁷ although was not made out because B's consent was not informed.⁶⁸

B's consent does not automatically provide X with a defence. Ultimately the question will be whether it is 'fair and equitable' for B to seek relief against X.⁶⁹ In *Allan v Rea Bros Trustees Ltd*, for example, the English Court of Appeal held that 'it would be unconscionable' for B to claim against X based on the fact that B 'knew of and hoped to take advantage of' the trustee's non-compliant execution.⁷⁰

d. Third-party interests

Finally, there are cases that demonstrate the applicability of the equitable discretionary factor that takes account of third-party interests.⁷¹ In *Harper v Brown*, third-party interests prevented orders for the transfer of specific property, and

⁶⁵ *Fung v Tong* [1918] AC 403, 408–11 (the Board).

⁶⁶ *Spellson v George* (1992) 26 NSWLR 666, 669–70 (Handley JA); *Byrnes* (n58) [25] (French CJ), [77] (Gummow and Hayne JJ); *Fletcher v Collis* [1905] 2 Ch 24, 32 (Williams LJ), 33 (Romer LJ), 36–37 (Stirling LJ).

⁶⁷ *Eaves v Hickson* (1861) 30 Beav 136, 142–43 (Sir John Romilly MR).

⁶⁸ Consent must be *informed*. In relation to the standard, quality and content of disclosure, see further: *Maguire v Makaronis* (1997) 188 CLR 449, 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Farah Constructions* (n35) [107]–[108] (the Court).

⁶⁹ *Spellson* (n66) 669–70 (Handley JA); *Byrnes* (n58) [25] (French CJ), [77] (Gummow and Hayne JJ).

⁷⁰ *Allan v Rea Bros Trustees Ltd* [2002] EWCA Civ 85 [65] (Walker LJ; Aldous and Keene LJ agreeing).

⁷¹ *Giumelli v Giumelli* (1999) 196 CLR 101 [50] (Gleeson CJ, McHugh, Gummow and Callinan JJ); *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 [128]–[129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

resulted in orders for payment of the *value* of that property.⁷² In this case, T sold trust property to a group of co-purchasers, some of whom could make out the plea of bona fide purchaser, and some of whom could not.⁷³ The interests of the purchasers who could raise the bona fide plea prevented orders for specific relief. Manning PJ ordered the purchasers who could *not* make out the plea of bona fide purchaser to pay the value of their interest in the subject property.⁷⁴

What is significant about *Harper v Brown* is that it demonstrates not only the applicability of equitable discretionary factors, but also a different role for the factors. Laches, acquiescence and consent, for example, operate as bars to B's claim, but in *Harper v Brown*, third-party interests was a consideration relevant to the court's assessment whether to award relief against X (inquiry (ii)) *and* another inquiry, which is the *form of equitable relief* (inquiry (iii)).

e. Relief on terms – B to provide counter-restitution

Another pattern in the cases⁷⁵ is that B's relief may be awarded on terms that require B to provide counter-restitution to X of any benefit which is received by B personally or which accrues to the trust estate. This is shown by *Palmer v Monk*,⁷⁶ where Jacobs J made B's relief conditional upon B reimbursing X for the purchase price and the lesser of the capital appreciation of the land, or X's expenditures and improvements to the land.⁷⁷ Payment of this sum by B was secured by a lien against the property in X's favour.⁷⁸ Jacobs J stated that B 'cannot have both the benefit of a breach of trust and an injunction to restrain the breach of trust' and went on to state:

⁷² *Harper* (n52), affd on appeal [1887] NSWLR 116, 121.

⁷³ *Harper* (n52) 113–14 (Manning PJ), affd on appeal [1887] NSWLR 116, 120–22 (the Court).

⁷⁴ *Harper* (n52) 113–14.

⁷⁵ In addition to the cases discussed next, relief to B's claim was made conditional on B providing counter-restitution to X in *Perpetual Trustee Co* (n31); *Crow v Campbell* (1884) 10 VLR (Eq) 186, 195 (Molesworth J); *Dudley v Champion* [1893] 1 Ch 101, 114–16 (Lindley LJ); *Devaynes v Robinson* (1856) 24 Beav 86, 97 (Sir John Romilly MR); *A-G v Kerr* (1840) 2 Beav 420, 429 (Lord Langdale MR). See also: P Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 316.

⁷⁶ *Palmer* (n31).

⁷⁷ Less an amount that X received in rent and occupation fee.

⁷⁸ *Palmer* (n31) 790–93 (Jacobs J).

The court of equity does not penalize [X] ... [i]t merely requires that [X] ... do equity, and equity, as I understand it, involves a restitution so that the beneficiary is in the same position as he or she would have been if the transaction had not been effected or sought to be effected.⁷⁹

The *uniform* pattern in *Palmer v Monk*, and other cases,⁸⁰ is that B is required to provide counter-restitution *only to the extent that B or the trust estate* has benefited from X's expenditure. The concept of benefit is not defined in these cases. The label 'benefit' is used to identify what, if any, amount of X's funds or property (such as the purchase price paid by X, funds lent by X or improvements paid for by X) is received and applied towards the trust estate or B personally.⁸¹ Receipt does not have a technical meaning other than to distinguish the funds that the trustee applies towards her own personal use.

The significance of counter-restitution is clearly to demonstrate that B's equity for relief is informed by equitable discretionary factors. As explained by Lord Langdale MR in *A-G v Kerr*, in the context of B's claim to recover property misapplied from a charitable trust:

The charity having equity, *must on its part do equity*, and the question is, what ought to be done with regard to the very great and valuable expenditure which has been made?⁸²

In this case, Lord Langdale MR found that it was 'no more than just and reasonable' for B to make counter-restitution of the value of the improvements X had made to the subject property.⁸³

Another important facet of this pattern is evident in the scenario where the funds paid by X are *not* applied to the use of B, or the trust estate, but for example are applied to T's personal use. In this scenario, B does *not* need to make counter-restitution to X. For example, in *Devaynes v Robinson*, B's relief was made conditional upon B repaying to X only the amount of the funds that were actually

⁷⁹ *Palmer* (n31) 790–91 (Jacobs J).

⁸⁰ See n75.

⁸¹ I have not found a case where X claims quantum meruit for services, for example as improvements to property to be returned.

⁸² *A-G v Kerr* (n75) 429 (emphasis added).

⁸³ *A-G v Kerr* (n75) 429.

applied to the benefit of the trust estate.⁸⁴ B's claim was not made conditional upon counter-restitution of the outstanding portion of the funds advanced by X and applied not towards the trust estate but to T's personal use. Regarding this amount, X essentially bore the loss of T's non-compliant execution. Similarly, in *Dudley v Champion*, X's liability was reduced only to the extent that the sum advanced by X to T was applied to B's benefit as opposed to being used personally by T.⁸⁵

Two important conclusions can be drawn from this pattern: (i) B's responsibility to make counter-restitution is limited to the extent that the benefit is applied to B's personal use or the trust estate; and (ii) as between B and X, it is X who bears the loss associated with a non-compliant execution.⁸⁶ These conclusions will be important for this thesis' account of the function and rationale of the claim in Chapter 9.

Finally, it should be observed that there are obvious overtones of other principles that might generate a claim for counter-restitution, such as proprietary estoppel⁸⁷ and restitution for X's mistakenly conferred improvements to land or other property,⁸⁸ albeit the cases informing the analysis above do not expressly refer to these doctrines, and nor were they pleaded by X. It is ultimately beyond the scope of this thesis to interrogate the discrete claims informing counter-restitution for X. The key points are to note its role, and to observe that in some cases the award of counter-restitution is expressly described as an incident of equitable discretion.

4. The beneficiary's proprietary claim is subject to limited equitable discretion

This Part B.4 makes two observations based on the analysis in Part B.3 above: (i) equitable discretion does apply to the beneficiary's proprietary claim; but (ii) its role is limited when compared to the role of discretion in relation to other equitable claims. Each observation is discussed in turn.

⁸⁴ *Devaynes* (n75) 97 (Sir John Romilly MR).

⁸⁵ *Dudley* (n75) 114–16 (Lindley LJ).

⁸⁶ X may have a separate claim against T; however, this does not change the conclusion that, as between B and X, it will be X who will suffer loss.

⁸⁷ See generally: B McFarlane, *The Law of Proprietary Estoppel* (OUP 2014).

⁸⁸ HW Tang, 'An Unjust Enrichment Claim for the Mistaken Improver of Land' [2011] Conv 8.

i. Equitable discretion applies to the beneficiary's proprietary claim

The analysis in Part B.3 above clearly demonstrates that equitable discretion does apply to the beneficiary's proprietary claim. It is respectfully submitted that cases that suggest otherwise, such as *Foskett v McKeown*,⁸⁹ are wrong.

Two implications follow from this observation. *First*, the applicability of discretionary factors further tends against the proprietary rights account of the beneficiary's proprietary claim. Part B.3 above demonstrated that B's equity for relief is subject to equitable discretion. B's equity for relief as asserted by the claim does not assert an absolute right in relation to specific property. For the reasons discussed in Chapter 2,⁹⁰ the discretionary nature of B's equity for relief is one reason the proprietary rights account is flawed.

Second, equitable discretionary factors and bars to relief can be added to the defences and denials that evidence a varied defence regime applicable to balance B's interest with that of X. This will be important for precisely identifying the potential role of the change of position defence in Part C.1 below.

ii. The limited role of equitable discretion

While it is clear that equitable discretion is applicable to the beneficiary's proprietary claim, its role is limited when compared to the role of discretion in relation to other equitable claims, such as equitable estoppels. Part B.3.i above delineated three stages of inquiry to which equitable discretion might be relevant: (i) the extent of B's equity for relief; (ii) whether any relief will be awarded against X, in particular; and (iii) the form of relief considered necessary to satisfy the equity raised. Part B.3.ii demonstrates that equitable discretion informs two of these inquiries: inquiries (ii) and (iii). Equitable discretion is relevant to the court's decision whether to award B relief against X (inquiry (ii)) and the court's assessment of what form of relief will satisfy B's equity (inquiry (iii)). Equitable discretion does not inform the extent of B's equity for relief (inquiry (i)).

In relation to the extent of B's equity for relief, the analysis in Chapter 4⁹¹ demonstrated that a clear and consistent pattern is presented by the cases,

⁸⁹ *Foskett* (n1) 109 (Lord Browne-Wilkinson), 127 (Lord Millett); n50.

⁹⁰ Chapter 2, Parts C.2–3.

⁹¹ Chapter 4, Part D.

according to which the extent of B's equity is fixed. The extent of B's equity is for relief necessary so that it is as if the non-compliant execution had not occurred, and as if T/D were disabled from exercising the impugned power, and B's interest against T were immune from its exercise.

A comparison can now be made with other equitable doctrines, such as equitable estoppels, where equitable discretion informs the extent of the promisee's equity, inquiry (i), in addition to inquiries (ii) and (iii).⁹² In this context, the extent of the promisee's equity is not fixed, and might be assessed as requiring prevention of B's detriment,⁹³ or fulfilment of her expectations,⁹⁴ or perhaps something in between.

The significance of the limited role of equitable discretion in the context of the beneficiary's proprietary claim provides a basis on which to reconcile, at least in part, the observations of Lord Browne-Wilkinson and Lord Millett in *Foskett v McKeown* with the discussion above. Those comments could be understood as going to the fact that equitable discretion has no bearing on the extent of B's equity for relief. However, for the reasons set out above, the reasoning in this case, and those following it,⁹⁵ is wrong to the extent that it denies a role for equitable discretion at all in this context.

C. The change of position defence and the beneficiary's proprietary claim

1. The issue and its significance

This Part C considers the applicability of the change of position defence to the beneficiary's proprietary claim. Broadly speaking, change of position is concerned with a defendant's alteration of position referable to receipt⁹⁶ such that it would be

⁹² See eg: *Giumelli* (n71) 111–12 (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Sidhu v Van Dyke* (2014) 251 CLR 50 [87] (French CJ, Bell, Kiefel and Keane JJ).

⁹³ *Sidhu* (n92) [84].

⁹⁴ A small sample includes: *Thorner v Major* [2009] UKHL 18 [2009] WLR 776; *Sullivan v Sullivan* [2006] NSWCA 312 [18]–[19]; *Donis v Donis* (2007) 19 VR 577 [19]; *Sidhu* (n92) [58], [75]–[78], [85]. See generally: Heydon, Leeming and Turner (n12) [17–285].

⁹⁵ *Foskett* (n1) 109 (Lord Browne-Wilkinson), 127 (Lord Millett); n50.

⁹⁶ There is some divergence on the necessary link needed between the defendant's change of position and receipt. In England, the 'wide view' of change of position has support: *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 579–81 (Lord Goff); *Scottish Equitable plc v Derby*

inequitable to require the defendant to make restitution to the plaintiff. Its effect is *pro tanto*, as it reduces the defendant's restitutionary liability *to the extent* of her change of position.

Change of position raises two questions for consideration in this thesis. The *first* is whether, as a matter of positive law, the defence is available in answer to the beneficiary's proprietary claim. If it is not, the *second* question is whether the defence *should* be available. The rest of this Part C will address the first question and, in summary, argue that change of position is not available in relation to the beneficiary's proprietary claim. Chapter 10 will consider the question whether change of position *should* be applicable to the beneficiary's proprietary claim.

Resolution of the questions identified in the paragraph above depends, in part, upon resolution of another area of uncertainty concerning the defence of change of position itself. The boundaries of the change of position defence are contested and there is debate over whether change of position is unique to claims in unjust enrichment and operates as a denial of the enrichment enquiry, or is a defence that applies broadly to any claim for restitution, no matter the relevant event or reason for restitution.⁹⁷ Resolution of the scope of change of position and the applicability of change of position to the beneficiary's proprietary claim are, to an extent, interdependent, as the analysis below will show.

In relation to the significance of this issue, there is a limited range of factual scenarios where the (un)availability of change of position matters, having regard to the range of defences, denials and equitable discretionary factors available to X to defeat the beneficiary's proprietary claim.⁹⁸ The availability of change of position

[2001] EWCA Civ 369 [30]–[31] (Walker LJ). In Australia, the 'narrow view' of change of position is preferred: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 379–85 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Citigroup Pty Ltd v National Australia Bank Ltd* (2012) 82 NSWLR 391 [5]–[6] (Bathurst CJ, Allsop P and Meagher JA). See further: E Bant, 'Change of Position: Outstanding Issues' in A Dyson, J Goudkamp and F Wilmot-Smith, *Defences in Unjust Enrichment* (Hart Publishing 2016) 151–55.

⁹⁷ A question left open in *Lipkin Gorman* (n96) 580 (Lord Goff). See also: R Chambers, 'Proprietary Restitution and Change of Position' in A Dyson, J Goudkamp and F Wilmot-Smith, *Defences in Unjust Enrichment* (Hart Publishing 2016) 130–31; E Bant and J Edelman, *Unjust Enrichment* (2nd edn, Hart Publishing 2016) 354–55.

⁹⁸ Assuming a statutory change of position defence does not arise: see Part C.2 below.

really counts where X's change of position does not raise the plea of bona fide purchaser, and is not connected to B's conduct sufficiently to raise one of the equitable defences considered above in Part B.3.ii. Edelman and Bant give an example of where the applicability of change of position matters, which is where X 'gives away his right to the subsidised council accommodation' in reliance on receipt of title to a house which happens to be misapplied trust property.⁹⁹ In this scenario, X cannot deny B's claim on the basis that X no longer retains the property. Nor can X rely on the bona fide plea or (unless B has engaged in some disentitling conduct) on laches, acquiescence, waiver, consent or estoppel. Change of position is the only defence that would limit X's responsibility to B's claim in response to X's change of position.

Thus, it is a small, but potentially significant, conceptual territory in which the availability of the change of position would matter to the outcome of a case. Whether this territory should be covered by change of position will be dealt with in Chapter 10. The rest of this Chapter will show that, as a matter of positive law, this territory is not covered by change of position in X's favour as the defence does not apply to the beneficiary's proprietary claim. This Chapter's argument depends on: (i) showing that the cases demonstrate the inapplicability of change of position (Part C.2); (ii) addressing competing arguments (Part C.3); and (iii) considering these issues as they relate to the defence with a wider scope of application beyond unjust enrichment (Part C.4).

2. Positive law – change of position does not apply

The weight of case authority in England and Australia is that change of position is not a defence to the beneficiary's proprietary claim.¹⁰⁰ In *Foskett v McKeown*, Lord Millett rejected application of the defence in this context.¹⁰¹ In some Australian states, this position is altered by statute. In Queensland and Western Australia,

⁹⁹ Bant and Edelman (n97) 354. A functionally similar example is given in a different context in Lodder (n31) 224–25.

¹⁰⁰ See eg: *Ministry of Health v Simpson* [1951] AC 251, 276 (Lord Simonds); *K & S Corp Ltd v Sportingbet Australia* (2003) 86 SASR 312 [157] (Besanko J). See also: Millett (n75) 324–26; B McFarlane, 'Unjust Enrichment, Property Rights, and Indirect Recipients' (2009) 17 RLR 37, 55; *Lewin on Trusts* (n25) [41-059].

¹⁰¹ *Foskett* (n1) 129 (Lord Millett).

there are various statutory provisions that give X a defence of change of position.¹⁰² Broadly speaking, the statutory provisions map the defence as it is defined in the common law, although each has a slightly different scope of application. The significance of the statutory intervention is that it lends some support to the argument that the defence did not otherwise exist as a matter of common law. In support, Heenan J in *Young v Kestel* stated that the statutory change of position defence was ‘plainly designed to overcome an earlier view that there was, in equity, no general defence against a change of position’.¹⁰³

3. Addressing competing arguments in favour of change of position

It is acknowledged that, contrary to this thesis’ argument in Part C, there are cases that have expressly recognised, or have later been interpreted as evidencing, the availability of change of position as a defence to the beneficiary’s proprietary claim. These cases do not undermine this thesis’ position for three reasons: (i) one key authority, *Re Diplock*,¹⁰⁴ does not expressly concern change of position (Part C.3.i); (ii) some cases are better understood as evidencing how B’s relief may be granted on terms requiring counter-restitution, not change of position (Part C.3.ii); and (iii) other cases apply change of position on the incorrect assumption that the beneficiary’s proprietary claim is part of the law of unjust enrichment (Part C.3.iii).

i. *Re Diplock*

Re Diplock,¹⁰⁵ has been relied upon as an example of the defence of change of position defeating the beneficiary’s proprietary claim.¹⁰⁶ In this case, some of the beneficiary’s proprietary claims failed as X no longer retained the subject property or its traceable substitute. For example, X had spent some of the trust funds on

¹⁰² Trustees Act 1962 (WA) s 65(8); Property Law Act 1969 (WA) s 125; Trusts Act 1973 (Qld) s 113(3); Succession Act 1981 (Qld) s 53(5).

¹⁰³ *Young v Kestel* [2003] WASCA 190 [71] (McLure J agreeing) (emphasis added), in relation to Trustees Act 1962 (WA) s 65(8).

¹⁰⁴ *Re Diplock* (n19).

¹⁰⁵ *Re Diplock* (n19).

¹⁰⁶ E Bant, *The Change of Position Defence* (Hart Publishing 2009) 201, citing *Re Diplock* as a ‘possible’ example; K Mason, J Carter and G Tolhurst, *Mason and Carter’s Restitution Law in Australia* (3rd edn, LexisNexis 2016) [2407]. See also: G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 696.

improvements to land and buildings. It is submitted that reliance on *Re Diplock* in support of change of position applying to the beneficiary's proprietary claim is problematic. *Re Diplock* was decided prior to recognition of the change of position defence.¹⁰⁷ The express reason for denying B's claim was that X no longer retained the traceable substitute.¹⁰⁸ Further, Lord Simonds in the House of Lords decision expressly dismissed X's argument that X received property 'in good faith and having spent it without knowledge of any flaw in [X's] title, ought not in conscience ... be ordered to refund'.¹⁰⁹ Having regard to Lord Simonds' reasoning, and the reasoning in the Court of Appeal, *Re Diplock* is best understood as demonstrating the point made in Chapter 6 that X's responsibility is conditioned upon her retention of the subject property.

ii. Cases of counter-restitution

There are those cases discussed above in Part B.3.ii.e where relief was granted on terms requiring counter-restitution by B in X's favour. Leaving aside the point that these cases do not expressly mention the defence of change of position, it might be suggested that the availability of counter-restitution, in substance, is evidence of the change of position applying to B's claim. This is not, however, a valid argument. Counter-restitution in these cases did not operate even in substance like change of position because it did *not respond to or reverse X's change of position*. Counter-restitution was limited to *reversing any benefit received by B or the trust estate*, which may have been less than what X provided. Counter-restitution may have incidentally had the effect of addressing some of X's change of position, but it was not conditioned or calibrated to achieve this aim.

iii. Cases based on unjust enrichment

There are a group of cases that expressly state that change of position is applicable to the beneficiary's proprietary claim *on the basis that the claim is unjust enrichment*.¹¹⁰ A leading example is *Boscawen v Bajwa*, in which B sought

¹⁰⁷ In *Lipkin Gorman* (n96).

¹⁰⁸ *Re Diplock* (n19) 545–51 (the Court).

¹⁰⁹ *Ministry of Health* (n100) 276.

¹¹⁰ See also: *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156 [103]–[106] (Morris QC). *Spangaro v Corporate Investment Australia Funds Management Ltd* [2003] FCA 1025 is also relied on in Bant, *The Change of Position Defence* (n106) 201 as another case in

subrogation to an equitable security interest over X's land in response to misapplied trust funds being used to repay a mortgage over X's land.¹¹¹ Millett LJ indicated that B needed to 'show that the defendant's unjust enrichment was at his expense ... [and] ... [i]n such a case the defendant will ... raise the defence of innocent change of position'.¹¹² Likewise, in *Gertsch v Atsas*, change of position was considered applicable to defeat a proprietary claim to recover property misapplied from an intestate estate *on the basis that the claim was based on unjust enrichment*.¹¹³ There are also academic¹¹⁴ arguments to a similar effect, particularly in relation to B's claim to the traceable substitute.¹¹⁵

These cases and academic opinion expressly condition the applicability of change of position on the incorrect premise that the beneficiary's proprietary claim *is* a claim for restitution in response to unjust enrichment. These arguments are also based on the view that change of position is a defence unique to unjust enrichment. Accepting for now this thesis' arguments in Chapter 2, and further arguments in Chapter 10, that the beneficiary's proprietary claim is not based on unjust

favour of change of position applying to the beneficiary's proprietary claim; however, this case provides limited support for that view as X did not raise any defence, let alone change of position. In *Spangaro* Finkelstein J did, however, characterise B's claim as one in unjust enrichment, leaving open the implication that defences which normally apply to unjust enrichment might be available, such as change of position, see eg [48], [53]. In *Koorootang v ANZ Banking Group Ltd* [1998] 3 VR 16, 100–05, Hansen J expressed the view that knowing receipt liability should be understood as restitution for unjust enrichment, and on that basis change of position defence would apply. This case is of no further significance because Hansen J did not consider the beneficiary's proprietary claim, and the conclusions reached in relation to knowing receipt and change of position must be read in light of *Farah Constructions* (n35) and *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

¹¹¹ *Boscawen* (n51) 334.

¹¹² *ibid*.

¹¹³ *Gertsch v Atsas* [1999] NSWSC 898 [22] (Foster AJ).

¹¹⁴ P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 239; A Burrows, 'The Relationship between Unjust Enrichment and Property' in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008) 352–57.

¹¹⁵ In contrast to other academic views according to which change of position applies because it is a defence of general application to restitution, including the beneficiary's proprietary claim, and not on the basis that the claim is itself unjust enrichment, as discussed further in Part C.4 next.

enrichment, then this group of cases and academic opinion, according to their own terms, are not applicable to the beneficiary's proprietary claim. If the beneficiary's proprietary claim is not part of unjust enrichment, then change of position does not apply, either.

4. Change of position as a defence generally applicable to claims for restitution?

As mentioned above, the scope of change of position is contested. There are cases and academic views according to which the defence applies generally to restitutionary claims, irrespective of whether the claim is based on unjust enrichment.¹¹⁶ An important limit to this broader conception of the change of position defence is that it will not apply where its application would *undermine the policy informing B's claim*.¹¹⁷ There is some academic support for the application of this wider conception of the defence to the beneficiary's proprietary claim.¹¹⁸ A contrary view has been expressed, according to which this wider version of change of position should not¹¹⁹ be available in response to the beneficiary's proprietary claim on the basis that it would undermine the policy of B's claim.

In resolving this debate, it is important to observe that both sides are premised on the view that the policy informing B's claim is either unjust enrichment or the vindication of B's proprietary right. The position taken in this thesis is that the policy informing B's claim is neither unjust enrichment nor vindication of proprietary rights. Chapter 10 will set out this thesis' reasons why unjust enrichment is not the underlying policy of B's claim, and as discussed in Chapter 2, B's claim is not based on the policy of protecting B's proprietary rights. The question whether a broader change of position defence is applicable to B's claim is not a matter of balancing the

¹¹⁶ See eg: *Australian Financial Services & Leasing* (n110) [77]–[80] (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Lipkin Gorman* (n96) 580 (Lord Goff); Mason, Carter and Tolhurst (n106) [2410]; Virgo (n106) 680–82; Bant, 'Change of Position: Outstanding Issues' (n96) 141–49, 162; Bant, *The Change of Position Defence* (n106) 208; Chambers (n97) 130–31; Bant and Edelman (n97) 354.

¹¹⁷ *Australian Financial Services & Leasing* (n110) [77]–[82] (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Lipkin Gorman* (n96) 580 (Lord Goff); Mason, Carter and Tolhurst (n106) [2410].

¹¹⁸ See eg: Bant, *The Change of Position Defence* (n106) 208; Mason, Carter and Tolhurst (n106) [2407]–[2410]; Virgo (n106) 680–82, 696; Chambers (n97) 130–31.

¹¹⁹ See eg: *Armstrong DLW* (n110) [103]; D Fox, 'Legal Title as a Ground of Restitutionary Liability' [2000] RLR 465, 488.

policies in favour of vindicating proprietary rights or reversing unjust enrichment, with whether it is otherwise inequitable to require X to make restitution.

Resolution of the question whether the change of position defence should apply to B's claim, rather, depends upon balancing the policy informing B's claim with protecting X's change of position. This in turn requires the precise identification of the underlying policy of B's claim, which is the concern of Chapter 9, and assessment of whether that norm precludes the change of position defence, considered in Chapter 10.

D. Conclusion

This Chapter has made two arguments. *First*, there is a regime of defences, denials and equitable discretionary factors applicable to the beneficiary's proprietary claim that demonstrates that B's equity for relief, like any other equity for relief, is not an absolute right but subject to equitable discretion. *Second*, the change of position defence does *not* apply to the beneficiary's proprietary claim, at least as a matter of positive law. Whether the defence *should* apply is a question that will be addressed in Chapter 10. Having regard to the contested scope of change of position, this thesis' further consideration of change of position can only be determined in light of an accurate account of the beneficiary's proprietary claim itself, which is the aim of the next Chapter.

Chapter 9 – The beneficiary’s proprietary claim as an assurance for the essential feature of an express trust

A. Introduction

Chapter 3 showed that equity’s recognition of the express trust creates the problem that power can be exercised in a manner that undermines the essential feature of the institution, referred to as a non-compliant execution. The significance of this is that the institution has failed to function in line with its normative expectations. This Chapter 9 will argue that the beneficiary’s proprietary claim provides a solution to this problem by supplying an *assurance* for equity’s standards. The beneficiary’s proprietary claim functions as an assurance such that in the event of a non-compliant execution, the claim recognises an equity for relief so that it is as if the non-compliant execution had not occurred. The beneficiary’s proprietary claim thereby further implements equity’s commitment to the essential feature of an express trust.

This chapter will also argue that the assurance offered by the claim can be justified having regard to the risk profile presented by the way that an express trust devolves power. Specially, T holds powers as an incident of her title to trust property and these powers, as Chapter 3 demonstrated, are *unconstrained* by equity’s standards. Equity’s choice to recognise the express trust dictates a concomitant commitment to provide some form of assurance against the problem presented by its institutional vulnerability: the beneficiary’s proprietary claim.

To make out these arguments, it will be necessary to confront an issue identified in Chapter 3, which is that the beneficiary’s proprietary claim forms part of a broader phenomenon by which equity’s standards apply across other institutions that rely upon the devolution of power for their function. This Chapter will argue that despite some similarities, there remain important distinctions between the beneficiary’s proprietary claim and the proprietary claims arising in other institutional contexts. Further, these distinctions can be justified having regard to the different risk profiles presented by the ways that other institutions devolve power. The further purpose is to support the arguments in Chapter 10 why this

thesis’ account should be preferred to previous accounts based on ‘lack of authority’.

The arguments in this Chapter will proceed as follows. Part B will explain how the beneficiary’s propriety claim functions as an assurance for equity’s standards and implements equity’s commitment to the essential feature of express trust. Part C will distinguish the assurance function of the beneficiary’s proprietary claim from the functions of equity’s other controls on power. Part D will set out this thesis’ justifications for the assurance provided by the beneficiary’s proprietary claim. Part E will distinguish the beneficiary’s proprietary claim from proprietary claims arising in other institutional contexts and consider the possible justification for this distinction.

B. The beneficiary’s propriety claim functions as an assurance

This Part B will argue that the function of the beneficiary’s proprietary claim is to provide an *assurance* that power will not be exercised inconsistently with equity’s standards. To make out this argument it will be necessary to: (i) define how this thesis uses the concept of an *assurance* (Part B.1); (ii) demonstrate that the claim has this function (Part B.2); (iii) identify the nature and strength of the assurance provided by the beneficiary’s proprietary claim (Part B.3); and (iv) explain how the availability of the claim to objects, persons interested in a charitable trust and trustees supports this function (Part B.4). Part B.5 will summarise how the assurance offered by the claim implements equity’s institutional commitment to the essential feature of an express trust.

1. Assurance – definition

An *assurance* is a strategy for dealing with risk. The strategy is to provide a form of collateral response upon the eventuation of the risk which is the non-occurrence of the assured state of affairs. There are different types of assurance and this thesis employs the concept in a particular way. The point of distinction relates to the *assured state of affairs* and the *form of collateral response*.

As Part B.2 will show, the *state of affairs* assured by the beneficiary’s proprietary claim is that power will not be exercised inconsistently with equity’s standards. Upon the non-occurrence of the assured state of affairs, being a non-compliant

execution, the *collateral response* is an equity for relief so that it is as if the non-compliant execution had not occurred.

The state of affairs that is the subject of some other assurances (also referred to as guarantees) is the *performance of a duty*. The risk assured against is non-performance of that duty. The non-occurrence of the assured state of affairs, being a default in performance, triggers a collateral response. That response is a collateral duty, such as a duty to pay, or liability, for example, to a power of sale over secured property. This thesis does not employ this concept of assurance. Chapters 4–6 demonstrated that the beneficiary’s proprietary claim does not respond to breach of a duty; nor does it impose a collateral duty to pay in the event of breach.

Further, this thesis does not use the concept of assurance to engage a contractarian understanding of the express trust. Assurance in that sense means ‘a mode of enforcing the trust deal’¹ between the settlor and trustee to protect the settlor’s reliance upon the trustee’s promise. The analysis in the previous chapters demonstrated that the claim is not concerned with a settlor’s reliance, a trustee’s promise, or performance of any promise.

2. The function of the beneficiary’s proprietary claim

The aim of this Part B.2 is to demonstrate that the beneficiary’s proprietary claim functions as an assurance that power will not be exercised inconsistently with equity’s standards. To make out these arguments, it will be necessary to set out: (i) the state of affairs assured by the beneficiary’s proprietary claim (Part B.2.i); and (ii) the collateral response provided (Part B.2.ii).

i. The assured state of affairs

The *state of affairs* assured by the beneficiary’s proprietary claim is that power will not be exercised inconsistently with equity’s standards. This is shown by the analysis in Chapters 3–5 which demonstrated that: (1) powers held subject to an express trust should not be exercised unless in conformity with equity’s standards, that is in compliance with the trust terms, with fidelity to the donor’s purpose, and bona fide (Chapter 3); (2) the beneficiary’s proprietary claim is triggered when there is an exercise of power that fails to meet equity’s standards, referred to as a non-

¹ J Langbein, ‘The Contractarian Basis of the Law of Trusts’ (1995) 105 Yale LJ 625, 647–48.

compliant execution (Chapter 4); and (3) B's equity is for relief which is necessary so that it is as if the non-compliant execution had not occurred (Chapter 4).

The claim responds to the non-occurrence of the assured state of affairs, being a non-compliant execution. Power has been exercised in a manner that undermines the essential feature of an express trust. We will return to the significance of this problem in Part D below.

ii. Collateral response

Equity's *collateral response* to a non-compliant execution is to recognise an equity against X for relief necessary so that it is as if the assured state of affairs had always existed. Chapter 4 has demonstrated that B's equity for relief, once given effect, restores B and the trust estate to the position, or near enough, so that it is as if the non-compliant execution had not occurred. The collateral response is to place B in the position as if the assured state of affairs had always existed, that is, as if power had not been exercised inconsistently with equity's standards.

One example of this collateral response is *Palmer v Monk*, where Jacobs J explained that X, in response to the beneficiary's proprietary claim, is required to 'do equity, and equity ... involves a restitution so that the *beneficiary is in the same position as he or she would have been if the transaction had not been effected or sought to be effected*'.² In this case, the necessary relief was an order requiring the setting aside of a contract for sale of land entered into between T and X, and injunctions preventing T and X from taking steps to register the transfer documentation of which X had possession. Once relief was given effect, the trust estate and B's interest would have been restored to the position, or near enough, so that it was as if the non-compliant execution had not occurred. The collateral response was to place B in the position as if the assured state of affairs had always existed.

In considering the collateral response provided by the beneficiary's proprietary claim, there are two important observations to be made: (a) the claim does not recognise an equity for rescission or reversal of power; and (b) the collateral response restores a *negative* state of affairs. These are discussed next and have significance for this thesis' justification for the claim in Part C below, and the

² *Palmer v Monk* [1962] NSW 786, 790 (emphasis added).

distinction to be made between the beneficiary's proprietary claim, and other proprietary claims in different institutional settings, in Part D below.

iii. Form of collateral response is not rescission or reversal of a power

Part B.2.ii above argued that the collateral response recognised by the beneficiary's proprietary claim is restoration of the assured state of affairs by way of equitable relief necessary so that it is as if the non-compliant execution had not occurred.

In considering the form of collateral response recognised by the beneficiary's proprietary claim, the question arises whether it should be understood in terms of another model of response, such as rescission, or the reversal of power. This is especially so having regard to the fact that rescission, and the response to the beneficiary's proprietary claim, both have the retrospective effect³ of placing B in the position as if power had not been exercised. Further, other scholars have relied upon equitable rescission as an alternative model to understanding the response to the beneficiary's proprietary claim, particularly in relation to the recovery of traceable substitutes.⁴

This thesis takes the position that rescission is not a viable model for understanding the response to the beneficiary's proprietary claim, whether to the original property or its traceable substitute. Rescission in equity refers to equitable relief that reverses an impugned exercise of power by restoring the parties to their original position as regards the rights and obligations created by the exercise.⁵ Rescission may lead to further consequential relief, such as restitution of property or its value.

Rescission raises its own analytical instabilities, but accepting for now that it is essentially concerned with the reversal of an exercise of power, the point is to

³ N McBride, 'Rescission' in S Worthington and G Virgo (eds), *Commercial Remedies* (CUP 2018) 151.

⁴ As recognised in: P Birks, 'Overview' in P Birks, *Laundering and Tracing* (Clarendon Press 1995) 307–11; T Cutts, 'Dummy Asset Tracing' (2019) 135 LQR 140, 162–63. Contra: D Fox, 'Overreaching' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 102.

⁵ See generally: S Worthington, 'The Proprietary Consequences of Rescission' [2002] 10 RLR 28; B Häcker, 'Proprietary Restitution after Impaired Consent Transfers' (2009) 68 CLJ 324; B Häcker, *Consequences of Impaired Consent Transfers* (Hart Publishing 2013); D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014) chs 1, 13; McBride, 'Rescission' (n3) 160.

explain why it does not provide a proxy or model for understanding the beneficiary's proprietary claim. There are three reasons in support of this thesis' view: (a) B's equity is not confined to reversal of power; (b) B's equity is not contingent upon counter-restitution; and (c) B's equity ranks as an equitable interest. Each is discussed in more detail now.

a. B's equity is not confined to reversal of power

First, the cases demonstrate that B's equity for relief might include, but can be broader than, reversal of the non-compliant exercise of power. The reversal of power is not the only means of giving effect to the assured state of affairs, and the response to the beneficiary's proprietary claim sometimes goes beyond what is necessary to reverse the non-compliant execution between T and X₁. It is true that, in some instances, relief will have the effect of reversing the non-compliant exercise of power. An example is where T transfers title to trust property to X, and the relief in response to B's claim is that X is required to return that property or its traceable substitute to T (possibly a replacement trustee).⁶ In this instance, the collateral response to the claim has the same effect as reversal of the exercise of power.

However, the collateral response is not confined to reversal of the impugned exercise of power. Relief to set aside and reverse an exercise of power is just one of multiple means of placing B in the position as if the non-compliant exercise had not occurred. This is shown by other cases in which relief goes beyond what is necessary to reverse the exercise of power between T and X₁. In *Foskett v McKeown*, for example, B asserted her claim against a remoter recipient (eg X₂) of the traceable substitute of the property originally the subject of the impugned exercise of power.⁷ If B's equity were confined to reversal of the impugned exercise of power, B's claim in *Foskett* would have been confined to seeking relief against the direct recipient from T, the insurance company that received trust funds as payment of T's policy of life insurance (or perhaps the insurance company's bank). B would not have had a claim against the remoter recipients.

⁶ As in *Palmer* (n2); *Gadson v Gadson* [2003] WASC 48.

⁷ *Foskett v McKeown* [2001] 1 AC 102.

This was not, however, the case in *Foskett v McKeown*,⁸ or other cases⁹ where B's claim was successful against remote recipients. These cases show that B's equity is for relief necessary to place B in the position, or close enough, as if the non-compliant execution had not occurred, and not just the reversal of power. On this basis, rescission is not relevant in this context.

b. B's equity is not contingent upon counter-restitution

Second, there is the fact that B's equity in response to the beneficiary's proprietary claim is *not* contingent upon counter-restitution. Rescission on the other hand, is dependent upon the provision of counter-restitution. This is because rescission aims to reverse an exercise of power by restoring both parties to their position, or near enough, prior to the exercise of power,¹⁰ and requires the party seeking rescission to provide restitution to the party against whom rescission is sought.

If B's equity should be understood as rescission of the power as between T and X, then one might expect that B's equity is conditional upon X being restored to her original position. However, this is not the case. As explained in Chapter 8,¹¹ B's equity is not contingent upon providing counter-restitution to X of benefits *not* received by B or the trust estate. X can cross-claim for restitution of any benefit X has provided to B or the trust estate; however, this is not the same as B's equity being dependent upon counter-restitution.

c. B's equity ranks as an equitable interest

Third, and as will be discussed in more detail in Part B.3.ii below, the strength of the collateral response to the beneficiary's proprietary claim further demonstrates that rescission is not a viable model for understanding the beneficiary's proprietary claim. As explained in Part B.3.ii below, the *strength* of the collateral response refers to the priority of B's equity for relief. Chapter 6¹² demonstrated that the

⁸ *Foskett* (n7).

⁹ See eg: *A-G v Christ's Hospital* (1834) 3 My & K 344 (B recovered from remote recipient who did not deal with T); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 (B recovered from remote recipient who did not deal with T); *Cave v Cave* (1880) 15 Ch D 639 (B asserted priority of equity against remote recipient who did not deal with T).

¹⁰ O'Sullivan, Elliott and Zakrzewski (n5) [16.58].

¹¹ Chapter 8, Part B.3.ii.e.

¹² Chapter 6, Part D.3.ii.

priority is that of an equitable estate that gives B default priority over volunteers of legal title and later equitable interests. This is in distinction to a claimant's *mere equity* for rescission, which will be deferred in favour of a later equitable interest acquired for value and in good faith.¹³

The significance for now of these arguments is to secure this thesis' position that the form of collateral response is restoration of the assured state of affairs, which is distinct from rescission, and not confined to reversal of the non-compliant exercise of power. As addressed further below in Part D.2 the priority of B's claim is a feature requiring specific justification, particularly in light of academic criticism in relation to B's claim to traceable substitutes, and against remote recipients.

iv. Collateral response gives effect to a negative state of affairs

The next issue to consider in relation to the form of collateral response is that the assured state of affairs is *negative*: power will *not* be exercised if equity's standards are *not* satisfied. The implication is that the collateral response must be *retrospective*. B's equity is for relief placing her in the position *as if the non-compliant execution had not occurred*. This is in contrast to prospective relief that places B in the position as if the power had been exercised in accordance with equity's standards.

The assured state of affairs cannot be positive, and the collateral response cannot be prospective in this context. Equity's standards do not impose a duty to exercise power in a particular way, and do not demand the exercise of that power in the first place. The standards express what T/D *cannot* do, and do not express what T/D *must* do. Thus, an assurance of compliance with these standards must itself be negative in form. A prospective form of relief, on the other hand, would presume the existence of a duty that may¹⁴ not exist. Relief tailored to place B in the position as if power had been exercised in compliance with equity's standards would require

¹³ See eg: *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, 277–79 (Kitto J), 291 (Menzies J); *Phillips v Phillips* (1861) 4 De G F & J 208, 215; O'Sullivan, Elliott and Zakrzewski (n5) [3.45]–[3.51].

¹⁴ Note that in relation to powers held by T there will be parallel duties, such as a duty to obey the trust terms and a duty of good faith, but this is not necessarily the case in relation to fraud on a power, or donees of powers who are not trustees, see further: Chapter 5, Part B.2.

a court to decide how power should have been exercised. This would require the court to exercise a discretion it does not have.

Having set out the form of assurance, and the collateral response, Part B.3 next considers the nature and strength of the assurance provided by the beneficiary's proprietary claim.

3. Nature and strength of the assurance

This Part B.3 considers: (i) the *nature* of the assurance (Part B.3.i); and (ii) the *strength* of the assurance (Part B.3.ii). These features are important to this thesis' account of the function of the claim. For reasons discussed below in Part D.2 they require specific justification, particularly in light of academic arguments to the effect that such features lack a sufficient normative basis.¹⁵ The further significance of the nature and strength of the assurance relates to the broader question how the beneficiary's proprietary claim can be understood as a distinct facet of a larger phenomenon of proprietary claims arising across various institutional contexts that assure equity's standards, a question which will be considered in Part E below.

i. Nature of the assurance

The *nature* of assurance refers to the exigibility of the beneficiary's proprietary claim against X. Chapter 6 considered the conditions for X's responsibility to B's claim and demonstrated that X's responsibility depends upon X's retention of the subject property. X's responsibility is strict in the sense that it arises regardless of X's level of knowledge or wrongdoing. Drawing on these observations, the beneficiary's proprietary claim effectively allows B to transfer the responsibility of assuring equity's standards to X. The claim requires X to underwrite equity's institutional commitment to the essential feature of an express trust in a way that may require X to be left worse off. As shown in Chapter 8,¹⁶ and mentioned already in Part B.2.iii.b above, B's claim is not conditional upon counter-restitution so that, as between B and X, it will be X who bears the loss associated with a non-compliant execution.

¹⁵ See Part D.2 below.

¹⁶ Chapter 8, Part B.3.ii.e.

Pausing here, it is important to acknowledge that this thesis has deliberately avoided use of the term ‘proprietary’ to describe the nature of X’s responsibility. Previously, others have used the proprietary label to identify a third party’s liability that is conditioned upon possession or retention of property, without knowledge or wrongdoing.¹⁷ Use of the proprietary label may have some utility in distinguishing these features of the claim from other claims, for example, a claim that could be described as personal in the sense that it is exigible only against one legal person. However, and as acknowledged in Chapter 2,¹⁸ there is divergence over whether proprietary concepts should be employed at all in relation to B’s equity for relief. While resolution of this issue is beyond this thesis, this uncertainty is one factor that militates against use of the label.

There are two further reasons to avoid this term. *First*, while B’s equity and X’s responsibility may depend upon the existence of property, the extent of B’s equity cannot be reduced to the return of specific property. As discussed in Chapter 4,¹⁹ the extent of B’s equity is for relief as necessary to place B in the position as if the power had not been exercised. Sometimes, this takes the form of orders requiring X to exercise her power over the subject property so that this assured state of affairs is restored. However, on other occasions the orders do not relate to specific property but require X to repay a sum of money representing the value of the specific property.

The *second* reason to avoid using the term is that the beneficiary’s proprietary claim is not based upon the assertion of a proprietary right, for reasons discussed in Chapter 2.²⁰ It is acknowledged that this thesis has referred to the subject claim as the ‘beneficiary’s *proprietary* claim’. As explained in Chapter 1,²¹ this was for ease of reference and in light of the common vocabulary used in case law and academic scholarship so far. No matter the label used to describe the claim, the nature of the assurance provided is not concerned with B’s proprietary rights. Rather, and as set out above, the claim assures equity’s standards in the manner of execution of

¹⁷ See eg: R Nolan ‘Equitable Property’ (2006) 122 LQR 232.

¹⁸ Chapter 2, Part C.2.

¹⁹ Chapter 4, Part D.

²⁰ Chapter 2, Part C.

²¹ Chapter 1, Part A.1.

power held subject to an express trust. For these two reasons, this thesis has not described the nature of the assurance provided by the claim as ‘proprietary’.

A further feature of the nature of assurance is that it extends to the specific property originally subject to the non-compliant exercise of power, *and* to property that can be identified as the traceable substitute of the original property.²² As explained in Chapter 6, B may have a power to choose whether to assert the claim against the legal person who retains the original property or either of the legal person(s) who can be identified as retaining the traceable substitute(s). The effect of this power is to ‘*amplify*’²³ the nature of the assurance provided by the claim by presenting B with a wider range of targets against whom she can transfer responsibility to assure equity’s standards.²⁴ That said, the degree of amplification will not always be the same across different cases, and the options will depend on the particular dealings with the original property and later substitutes. If, for example, T gifts trust property to X, who keeps it, there will be no traceable substitute against which the claim can be made. This is a feature requiring specific justification, which is the concern of Part D.2 below.

ii. Strength of the assurance

The final feature discussed in this Part B.3.ii is the *strength* of the assurance, which relates to the priority of B’s equity for relief. As explained in Chapter 6,²⁵ B’s equity ranks as an equitable estate. The effect is to afford B default priority over later legal and equitable interests²⁶ and mere equities.²⁷ Having regard to the range of

²² Chapter 6, Part D.2.

²³ The idea of ‘amplification’ has been borrowed from S Worthington, *Equity* (2nd edn, Clarendon Press 2006) ch 4.

²⁴ A similar effect is observed in P Wendel, ‘Examining the Mystery behind the Unusually and Inexplicably Broad Provisions of Section Seven of the Uniform Trustees’ Powers Act: A Call for Clarification’ (1991) 56 MoLR 25, 31.

²⁵ Chapter 6, Part D.3.ii.

²⁶ As the case was in *Stroughill v Anstey* (1852) 22 LJ Ch 130 (Lord St Leonards LC); *Shropshire Union v R* (1865) LR 7 HL 496; *Newton v Newton* (1868) 4 Ch App 143; *Joyce v DeMoleyns* (1845) 2 Jo & Lat 374. See also: C Mitchell, D Hayton and P Matthews, *Underhill & Hayton: Law of Trusts and Trustees* (19th edn, LexisNexis 2016) [99.50].

²⁷ *Phillips* (n13) (Lord Westbury LC); *Latec Investments* (n13) 277–79 (Kitto J), 291 (Menzies J).

defences available to legal title holders, such as indefensibility of registered title to land and the plea of bona fide purchaser, this default priority in substance takes effect against volunteers of legal title and equitable title holders, whether for consideration or not.

Chapter 6²⁸ explained that B's priority is retrospective in the sense that B's equity, and X's responsibility, date from X's acquisition of the subject property. This gives B default priority in relation to interests created after X acquires the subject property, even before B's election to impose responsibility upon X. The strength of B's equity for relief will be of particular significance to the discussion in Part E below, which distinguishes the beneficiary's proprietary claim from proprietary claims in other institutional contexts, where the equity is a mere equity for relief.

4. Availability of the claim facilitates the assurance of equity's standards

Chapter 7 demonstrated that the equity asserted by the beneficiary's proprietary claim accrues to any object, person interested in a charitable trust or trustee. The availability of the claim lends further support to this Chapter's argument that the claim implements equity's institutional commitment to the express trust. This implementation can be observed in the scenario where the availability of the claim beyond the object with an absolute entitlement permits the control of power in circumstances where such control may not have occurred. In the case of a charitable trust, for example, there is no object with an absolute entitlement to trust property. Depending on the factual circumstances, persons interested in a charitable trust may be the only ones prepared to agitate the beneficiary's proprietary claim. If the claim were not available to them, then it may be that no action would be taken in relation to a non-compliant execution, and the essential feature of an express trust would be thereby undermined as it is not subject to control.

The same point can be made in relation to a trust creating discretionary powers of appointment, for example where T holds trust property with an exhaustive power to appoint among a class of objects, *class 1*, in default of exercise of a non-exhaustive power of appointment in favour of objects in *class 2*, prior to the default

²⁸ Chapter 6, Part D.3.ii.

date. The default date is 60 years from the date of declaration of trust. The objects of class 1, collectively, do have an absolute entitlement to the benefit of trust property upon the default date. However, before this time, they have no entitlement to the benefit of trust property. Owing to the discretionary nature of their individual entitlements, they may have little incentive to agitate the beneficiary's proprietary claim prior to the default date. If the claim were not available to the objects of class 2, then there would be no effective means of redress in response to a non-compliant exercise of power for a long period of time. The availability of the claim to the mere objects of class 2 ensures this is not the case.

5. Conclusion – the beneficiary's proprietary claim implements equity's institutional commitment

This Part B has argued that the function of the beneficiary's proprietary claim is to provide an assurance that power will not be exercised inconsistently with equity's standards. Equity's standards define the minimum necessary for an exercise of power to give effect to the essential feature of an express trust, which, as explained in Chapter 3, is that T holds and exercises her powers over trust property in accordance with the terms of trust. In turn, the assurance of equity's standards via the beneficiary's proprietary claim is, in substance, an assurance of the essential feature of an express trust. Equity's institutional commitment to the express trust is implemented through the recognition *and* assurance of the essential feature of an express trust.

In making this argument it is important to be clear that the beneficiary's proprietary claim may be one of multiple means for implementation of equity's commitment to the essential feature of an express trust. Chapter 3 considered the concept of the irreducible core of trustee duties which also implement equity's commitment to the essential feature of an express trust. While it is beyond the scope of this thesis to pursue this issue in detail, the point is to notice that there are other means of implementing equity's commitment. This agitates the question whether the particular means of implementation provided by the beneficiary's proprietary claim is sufficiently justified. This is a question to which we will return in Part D below.

C. Assurance distinguished from the functions of equity's other controls on power

As recognised in Chapter 3, equity's standards form part of a broader suite of equitable controls on power that apply within and outside express trusts. Broadly speaking, equity's controls can be understood as responding to the problem presented by the devolution of power. The problem is that power can be exercised even when it should not be. To further refine this thesis' account of the beneficiary's proprietary claim, it is necessary to distinguish between the assurance function of the beneficiary's proprietary claim, and the functions of some of equity's other controls on power. Fiduciary loyalty, for example, has been understood as having either a deterrence²⁹ or prophylactic function.³⁰ There is debate about the juridical underpinnings and content of fiduciary loyalty,³¹ which is beyond resolution in this thesis. Nonetheless, it is possible to show how the assurance function of the beneficiary's proprietary claim differs from the functions of deterrence, prophylaxis and disempowerment represented by some of equity's other controls on power, including fiduciary loyalty.

1. Deterrence

Deterrence is a function or strategy that refers to rules that discourage legal actors from engaging in conduct that may lead to an undesired impact or event, including an abuse of power.³² An example is criminal punishment for breach of a legal rule, which deters the specific individual from breaching the legal rule again and deters the general population as well.

²⁹ See eg: R Cooter and B Freedman, 'The Fiduciary Relationship: Its Economic Character and Legal Consequences' (1991) 66 NYULR 1045, 1048–53; R Sitkoff, 'The Economic Structure of Fiduciary Law' (2011) 91 BULR 1039, 1043.

³⁰ See eg: *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 [412]–[414] (Heydon JA); G Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968) 84 LQR 472, 474; P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989) 340–43; M Conaglen, *Fiduciary Loyalty* (Hart Publishing 2010) 61–76; L Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 J Eq 87.

³¹ See further: Chapter 3, Part B.1.

³² See further: Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (n30) 88–89.

The beneficiary's proprietary claim may sometimes, incidentally, have a deterrent effect. One effect of the claim is to transfer the risk of a non-compliant execution to X, who may be left in a worse position as a result of B's claim. This effect of the claim might deter some legal actors from purchasing property held on trust³³ *if* they are able to ascertain the existence of the trust, or perhaps encourage due diligence on the part of transacting parties.

Despite incidental deterrence, deterrence is not the primary function of the beneficiary's proprietary claim for two reasons. *First*, its elements and operation do not influence the conduct of a legal actor in a manner necessary to address the risk of a non-compliant execution. As observed by Professor Lionel Smith, 'deterrence can only work if the people at whom it is aimed are aware of the deterrent'.³⁴ The beneficiary's proprietary claim operates against X irrespective of her knowledge of the non-compliant exercise of power. Further, it may be difficult for X to know the facts that might reveal the deterrent, specifically that property is held subject to an express trust and non-satisfaction of equity's standards. This is the case where X deals with T who *is* the titleholder of property and able to present herself as such to X.

Second, the sanction imposed by the claim is not directed towards the legal actor who does control whether the undesired event occurs or not. It is T/D as the donee of power who controls whether equity's standards are satisfied. For the beneficiary's proprietary claim to have a deterrent function, it would need to impose sanctions on T/D to influence her actions, rather than X.

2. Prophylaxis

Another risk strategy is *prophylaxis*, which refers to legal principles that set a precaution against some problem. This function has been ascribed to fiduciary loyalty.³⁵ There is some divergence in scholarship over what is the problem that fiduciary obligations caution against, for example whether the event protected against is the fiduciary's non-performance of her non-fiduciary duties,³⁶ or the

³³ Langbein (n1) 642; Wendel (n24) 31.

³⁴ See further: Smith (30) 89.

³⁵ See n30.

³⁶ See eg: Conaglen (30) 61–76.

fiduciary's exercise of judgment or 'discretionary powers for improper reasons'.³⁷ Either way, the prophylactic measure or precaution is that the fiduciary is 'presumptively' forbidden from exercising judgement or power where the risk is present, as in conflict situations.³⁸

If the problem cautioned against by fiduciary loyalty is the manner in which power is exercised, as opposed to non-performance of fiduciary duties,³⁹ then there is a potential parallel between fiduciary loyalty and the beneficiary's proprietary claim on this thesis' account. Each is concerned with a similar problem: the way in which power is exercised. Despite this potential similarity, there is a critical distinction between these phenomena which demonstrates that each represents different functions. Fiduciary obligations *precaution* against the problem that a *fiduciary* will exercise power not in compliance with equity's standards. The beneficiary's proprietary claim, on the other hand, responds to the eventuation of this problem; it does not precaution against or prevent the problem of a non-compliant execution. The beneficiary's proprietary claim does not have a prophylactic function.

Further, the assurance provided by the beneficiary's proprietary claim has a wider scope of application than fiduciary prophylaxis. As explained in Chapters 3⁴⁰ and 5,⁴¹ equity's standards and the claim apply to any power held subject to an express trust, and *irrespective of* the fiduciary or non-fiduciary status of the donee of the power.

3. Disempowerment

Disempowerment is described by Professor Sitkoff as rules that 'minimize the agent's discretionary powers' such as the doctrine of ultra vires in corporate law.⁴²

³⁷ See eg: Smith (n30) 97, see also 95–100.

³⁸ Smith (n30) 88, see also 97–98.

³⁹ In Conaglen (n30) 61–76, fiduciary loyalty protects against the fiduciary's non-performance of her non-fiduciary duties. On this account, it is not necessary to distinguish the function of the beneficiary's proprietary claim from fiduciary loyalty as there is no identity of risk in the first place.

⁴⁰ Chapter 3, Part E.1.i.

⁴¹ Chapter 5, Part C.2.iii.a.

⁴² Sitkoff (n29) 1042. See also: Langbein (n1) 640–43.

There is some debate about the utility and continued role of disempowerment to prevent the risk of abuse of power.⁴³ Irrespective of the continued relevance of this strategy, the point is to observe that the beneficiary's proprietary claim does not function in this way.

As explained in Chapter 3, equity's standards for the exercise of power do not actually disable or disempower the trustee from exercising power held as an incident of her title to trust property. Indeed, the inability of equity's standards to disempower or actually disable T's non-compliant exercise of power is the problem addressed by the beneficiary's proprietary claim. The solution is to provide an assurance for equity's standards via B's claim.

D. The justification for the beneficiary's proprietary claim

1. Why assure equity's standards and the essential feature of an express trust?

To recap, this Chapter has so far argued that the function of the beneficiary's proprietary claim is to provide an assurance that power will not be exercised inconsistently with equity's standards. The assurance has a particular nature and strength having regard to X's strict responsibility, the extension to the traceable substitutes and priority of B's equity for relief. The standards assured by the claim define the minimum necessary for an exercise of power to give effect to the essential feature of an express trust. The assurance provided by B's claim implements equity's commitment to the essential feature of an express trust.

As foreshadowed in Part B.5 above, there is a question whether equity's standards *should* be assured. This Part D sets out this thesis' justification for the assurance provided by B's claim, including the nature and strength of the assurance. In summary, the claim can be justified as a response to the risk profile presented by the express trust. To make out this argument it will be necessary to explain: (i) the particular risk profile presented by an express trust; (ii) how the assurance provided by the beneficiary's proprietary claim allows this institution to function in accordance with its normative expectations; and (iii) how the assurance facilitates the settlor's reposal of trust in the institution. This is the aim of Part D.1.

⁴³ *ibid.*

Part D.2 will go on to set out this thesis' specific justifications for the nature and strength of the assurance. The arguments in this Part D are not only important for this thesis' justification for the beneficiary's proprietary claim, but also crucial to this thesis' reasons for distinguishing between the beneficiary's proprietary claim and proprietary claims arising in other institutional contexts in Part E below.

i. Risk profile of an express trust

Chapter 3 explained that the express trust relies upon the devolution of power for its function. Power is at once the strength and weakness of this institution. The devolution of power on terms defined by the settlor is what makes the express trust a bespoke and malleable option for the settlor to use. However, the devolution of power creates the problem that power can be exercised even when it should not be. The specific method employed by the express trust for devolving power presents a particular risk profile according to which this problem may be more or less likely to occur as compared with other institutions that devolve power in different ways.

As explained in Chapter 3,⁴⁴ the trustee's powers held as an incident of her title are *unconstrained* by equity's standards. The significance of this problem can be explained having regard to this thesis' arguments in relation to the essential feature of an express trust in Chapter 3.⁴⁵ That Chapter argued that equity gives effect to the essential feature of an express trust to ensure that the reasons for equity's choice to recognise this institution are maintained. The various normative justifications for an express trust are premised on an expectation of the essential feature of this institution. The normative threat posed by a non-compliant execution is that the express trust does not exist in a form consistent with its normative underpinnings.

Equity's concern about this problem is real. The reality of human fallibility is that positions of trust and confidence can and will be abused. The cases demonstrate the eventuation of this risk, for example where trustees deal with trust property for

⁴⁴ Chapter 3, Part E.1.ii.a.

⁴⁵ Chapter 3, Part C.

their own purposes.⁴⁶ Equity has long recognised that obligations in honour alone are not enough to support the institution of express trust, for example when the Chancellor first gave relief to a *cestuis que use* in the form of a subpoena to require a *feoffee to use* to appear before the Chancellor and account for their conduct.⁴⁷ Equity recognised the need to provide a response to restore B to the position as if the non-compliant execution had not occurred.

The institutional vulnerability of the express trust means that some other means are required to implement equity's commitment to the essential feature of an express trust. One of those means is the assurance provided by the beneficiary's proprietary claim. In support of this Chapter's arguments, there has been some express judicial recognition that the beneficiary's proprietary claim responds to this problem. In *Perham v Kempster*, Joyce J explained that if there were no beneficiary's proprietary claim, then '*no beneficiary under the trusts of a will or settlement would ever be safe*'.⁴⁸ Equity's recognition of the express trust necessitates the concomitant commitment to providing an assurance that power will not be exercised in a manner that undermines the reasons for recognition of the institution in the first place.

ii. Assurance facilitates trust in the institution of an express trust

The assurance offered by the claim permits a settlor to have confidence that her choice will be respected. The settlor's utilisation of an express trust entails some degree of trust and confidence in how power will be exercised, and which necessarily imports the risk of abuse. Equity must provide some assurance to permit the settlors' reposal of trust and thus the ongoing function and utility of the institution.⁴⁹ The claim offers an assurance to settlors that powers held subject to an express trust will not be exercised inconsistently with equity's standards, and the essential feature of an express trust.

⁴⁶ As in *Strang v Owens* (1925) 42 WN (NSW) 183; *Foskett* (n7); *Independent Trustee Services* (n9).

⁴⁷ Although it is difficult to pinpoint at what point and in which case this occurred, the development of the relief in favour of the *cestui que use* against a third party, and feoffee to use's heir, is traced in J Barton, 'The Medieval Use' (1965) 81 LQR 562, 568–71. See also: Worthington, *Equity* (n23) 63–65.

⁴⁸ *Perham v Kempster* [1907] 1 Ch 373, 380.

⁴⁹ See further: M Harding, 'Trust and Fiduciary Law' (2013) 33 OJLS 81.

The express trust can thus be understood as an institution that comes with an in-built insurance policy. The claim preserves the utility of the institution by assuring against a risk inherent to its institutional form. The pre-packaged insurance policy means that the settlor can place trust in the institution of an express trust without having to place personal trust in the legal persons in whom power is actually reposed.

Again, there is some limited judicial recognition of this justification for the beneficiary's proprietary claim. In the context of explaining why B's claim will not be postponed on account of her conduct in failing to monitor T, Turner LJ explained in *Cory v Eyre*:

The very first principle of trusts is, that the *cestui que trust* places confidence in his trustee, and if it is to be held that a *cestui que trust* is to be postponed upon the mere ground that he did not inquire into the acts or conduct of his trustee, that principle would, as it seems to me, be in a great measure, if not wholly, destroyed.⁵⁰

Turner LJ's statement is significant because it recognises how the claim permits the reposal of trust and confidence. We will return to this case in the next Part as it is also relevant to this thesis' justification for the nature and strength of assurance provided, which is set out next in Part D.2.

2. Justifying the nature and strength of assurance

Accepting this thesis' arguments that equity's standards should be assured, considered now is the justification for the nature and strength of the assurance provided by the claim: specifically, the exigibility and priority of B's claim against X, and its extension to traceable substitutes. The following analysis will also address previous academic arguments that these features lack a sufficient normative justification.

This thesis takes a fundamentally different approach to previous accounts based upon proprietary rights or unjust enrichment. Those accounts query the extent to which the law should protect B's equitable proprietary rights, or the extent to which B should have rights based upon a defendant's unjust enrichment. This thesis' justification for the nature and strength of the claim *depends on the need to*

⁵⁰ *Cory v Eyre* (1863) 1 De GJ & S 149, 169, see also 167–68 (Turner LJ).

preserve the standards in the execution of power and the essential feature of an express trust. Protection of proprietary rights or the reversal of unjust enrichment are not relevant justificatory norms.

In summary, the nature and strength of the assurance can be justified on the basis that they respond to a particular risk profile presented by the method by which an express trust devolves power. These arguments are set out in relation to: (i) the exigibility of the beneficiary's proprietary claim against X (Part D.2.i); (ii) the priority of B's equity for relief (Part D.2.ii); and (iii) the extension to traceable substitutes (Part D.2.iii).

i. Exigibility of the claim against X

The exigibility of the claim against X means that the assurance provided by the beneficiary's proprietary claim is not dependent upon the solvency of T. Unpacking this point further, and as mentioned in Part B.5 above, there are other forms of relief available where there is a non-compliant exercise of power, and which could also be understood as implementing equity's institutional commitment. For example, B can require T to account for her stewardship of the trust property and seek consequential money orders for relief against T.⁵¹ There are, however, limits to this other form of assurance, and these limits underscore a role for the beneficiary's proprietary claim. T's personal liability is only effective *to the extent that T either has the substitute property or is solvent*. If this were the only form of assurance, the essential feature of an express trust would be contingent upon T's solvency or retention of substitute property.

The exigibility of the beneficiary's proprietary claim against X ensures that this is not the case. The claim allows B to *transfer responsibility for assuring equity's standards* to X. The re-allocation of responsibility can be justified as necessary having regard to the vulnerability of the express trust to a non-compliant execution, and the limits of other forms of assurance. As much was expressly recognised in

⁵¹ See eg: *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484 [30]–[32] (the Court); *Agricultural Land Management Ltd v Jackson (No 2)* [2014] 48 WAR 1 [333]–[359] (Edelman J); S Elliot, 'Personal Monetary Claims' in McGhee J (ed), *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) ch 20; C Mitchell, 'Equitable Rights and Wrongs' (2006) 59 CLP 267, 278–80; M Conaglen, 'Equitable Compensation for Breach of Trust: Off Target' (2016) 40 MULR 126.

Perham v Kempster by Joyce J, who observed that ‘no beneficiary under the trusts of a will or settlement would ever be safe’ if the claim were not enforceable against X.⁵²

ii. Priority of B’s equity for relief

Next, there is the priority afforded to B’s claim, which, as discussed in Chapter 6,⁵³ ranks as an equitable estate or interest. Critically, this gives B priority over volunteers of the legal title, default priority over later equitable title holders, even if for value, and priority over any later mere equities. This feature has been criticised, especially in the context of improper exercises of power.⁵⁴ I have addressed these arguments as they relate to the effect of fraud on a power elsewhere.⁵⁵ The default priority afforded B is justified on the basis that the express trust is inherently open to abuse. This vulnerability demands some response to the eventuation of a non-compliant execution. The priority afforded B over later equitable interests, in particular those acquired for value, is pragmatically necessary or else the assurance provided by the claim would be easily defeated. There is some express judicial recognition of this justification for B’s default priority over later equitable interests. In *Cory v Eyre*, Turner LJ emphatically stated ‘there can be little doubt that a strong case must be required to justify’ the postponement of B’s claim for later equitable interests.⁵⁶

iii. Extension to traceable substitutes

Finally, there is the extension of the beneficiary’s proprietary claim to traceable substitutes which amplifies the assurance provided by the claim. This feature has previously been criticised,⁵⁷ and requires specific justification in this thesis. It is submitted that the extension of the claim to traceable substitutes should be understood as part of equity’s commitment to the essential feature of an express

⁵² *Perham* (n48) 380.

⁵³ Chapter 6, Part D.3.ii.

⁵⁴ R Walker, ‘The Limits of the Rule in *Re Hastings-Bass*’ [2002] PCB 226, 231.

⁵⁵ J Hudson, ‘One Thicket in Fraud on a Power’ (2019) 39 OJLS (advance online access) <<https://doi.org/10.1093/ojls/gqz017>>.

⁵⁶ *Cory* (n50) 167.

⁵⁷ See eg: Cutts (n4), discussed below in this Part. See also: Worthington, *Equity* (n23) 105–06, who distinguishes between claims to traceable substitutes against fiduciaries or non-fiduciaries.

trust. The same arguments made above in Part D.2.i as to why the claim should be exigible against X apply to explain why the claim should be extended to traceable substitute(s). The effect of this extension is, potentially, to provide B with a wider range of options for risk transfer. The extension to traceable substitutes makes it less likely that B's claim will be defeated in the scenario where there are multiple dealings with the original property. Were the beneficiary's proprietary claim not available against the traceable substitute, then the claim and the assurance it provides could be extinguished if the original property were to be consumed, destroyed, or damaged.

Further, it is submitted that the extension of the claim is critical to preserve equity's choice to recognise the express trust as a dynamic and flexible institution. *If* the claim did *not* extend to traceable substitutes, then the effectiveness of the assurance offered by the claim would depend upon the type of particular property settled on trust. Consider, for example, an express trust where the trust property is the trustee's title to a chose in action, such as a debt owed to T by her bank, as in *Foskett v McKeown*⁵⁸ and *Strang v Owens*.⁵⁹ In these cases, T's exercise of power, being the transfer of funds, *necessarily* involved some form of substitution or destruction of the original property, as T retained title to the specific property (that is, the chose in action). Alternatively, if the bank account was exhausted, then the original property no longer existed (that is, the bank's debt was discharged to T). *If* the beneficiary's proprietary claim were not exigible against traceable substitutes, then any express trust over choses in action (such as bank deposits) would not be protected by the beneficiary's proprietary claim. This would fundamentally undermine equity's choice to recognise the express trust as a dynamic and flexible institution. The assurance offered by B's claim would only be available in relation to trusts over some forms of property, not others.

Finally, it is necessary to address the argument that B's claim against X in relation to an interbank transfer from T to X is 'insufficiently robust'.⁶⁰ According to Dr Cutts, the beneficiary's proprietary claim is and should be confined to the scenario where

⁵⁸ *Foskett* (n7).

⁵⁹ *Strang* (n46).

⁶⁰ Cutts (n4) 141, 158.

B can *follow* a specific right from T to X.⁶¹ Cutts argues that an interbank transfer by T to X does not satisfy these parameters as it does not involve a transfer of a specific right from T to X that can be followed, but rather a process labelled by Cutts ‘dummy asset tracing’.⁶²

Thus, according to Cutts, the beneficiary’s proprietary claim should not be available against the recipient of misdirected bank transfers and B should be left with a claim to ‘unwind’ the impugned transaction as between *T and X*.⁶³ Although not directly addressed by Cutts, the implication of her arguments is that the beneficiary’s proprietary claim, whether or not in relation to misdirected bank funds, should not be available where X, rather than T, makes a substitution of property received by T; nor should it be available against remoter recipients, such as X₂ and X₃.

This thesis does not accept Cutts’ arguments because they: (a) are inconsistent with the cases; and (b) start from an incorrect assumption as to the applicable justificatory norms.

a. The cases

The analysis in Chapters 4 and 6 demonstrates that Cutts’ model is contrary to the cases. Those cases show that B can assert the beneficiary’s proprietary claim against X where she is the direct,⁶⁴ and even remoter, recipient of bank funds,⁶⁵ and outside the scenario of bank transfers, where X is the party who substitutes property⁶⁶ and where X is the remoter recipient who did not deal with T (or a donee of power).⁶⁷ These cases support this thesis’ account of the extension of the beneficiary’s proprietary claim to recipients of misdirected bank funds and remote recipients, and demonstrate that Cutts’ arguments are inconsistent with case authority.

⁶¹ *ibid* 158–63.

⁶² *ibid* 146–47.

⁶³ *ibid* 141, 162–63, relying on *Pitt v Holt* [2013] 2 AC 108.

⁶⁴ As in: *Strang* (n46).

⁶⁵ As in: *Foskett* (n7); *Independent Trustee Services* (n9).

⁶⁶ As in: *Dudley v Champion* [1893] 1 Ch 101.

⁶⁷ As in: *A-G v Christ’s Hospital* (n9); *Cloutte v Storey* [1911] 1 Ch 18, 30–32; *Redman v Permanent Trustee Co of New South Wales Ltd* (1916) 22 CLR 84, 93–94.

b. The applicable justificatory norms

Cutts argues that ‘precedent alone’ cannot justify B’s claim against X in the case of bank transfers⁶⁸ and that ‘normative rigour’⁶⁹ supports her model. Respectfully, it is submitted that there is a flaw in Cutts’ argument which is its starting premise. Cutts identifies the relevant justificatory norm as ‘property principles’⁷⁰ which, according to Cutts, demand that: (i) X can only be accountable to B via a proprietary claim if X receives a right to which B had a prior claim;⁷¹ and (ii) restitution based on proprietary rights can only be justified where X dealt with T.⁷²

The problem with this starting premise is that ‘property principles’ are not relevant to the beneficiary’s proprietary claim. Chapter 2 demonstrated that B’s claim is neither based on, nor justified by, the protection of proprietary rights. Thus, even if ‘property principles’ do demand the parameters identified by Cutts, they are not relevant to the beneficiary’s proprietary claim. These principles do not support Cutts’ argument that there is an insufficiently robust justification for B’s claim against X in relation to the interbank transfers. The further implication is that ‘dummy asset tracing’ in the case of interbank transfers is irrelevant in the context of the beneficiary’s proprietary claim, as this claim is not confined to the scenario where B can follow a right from T to X.

At the risk of repetition, it is submitted that there *is* a sufficient normative justification for the extension of B’s claim to traceable substitutes. The extension is a necessary amplification of assurance of equity’s standards, having regard to the institutional risk profile and equity’s choice to recognise the express trust as a dynamic and flexible institution.

It must be acknowledged that this thesis’ justification for the claim has implications for the process of tracing. As explained in Chapter 6, there are persistent uncertainties regarding the process of tracing which are beyond resolution in this thesis, save to make the following observation. On this thesis’ account of the claim, that process is critical to demarking the scope of the claim, and the degree to which

⁶⁸ Cutts (n4) 160.

⁶⁹ *ibid* 165.

⁷⁰ *ibid* 145, 159–60.

⁷¹ *ibid* 145, 160–63.

⁷² *ibid* 159–60.

the assurance it provides is amplified. If the process of tracing must be informed by the claim which it facilitates, then this thesis may inform any future account of that process.

E. Distinguishing the beneficiary's proprietary claim from claims that respond to non-compliant execution in other institutional contexts

1. Assurance of equity's standards across other institutional contexts

As foreshadowed in Chapter 3⁷³ and at the beginning of this Chapter, equity's standards are not unique to express trusts but have a broad application to powers arising in other institutional contexts.⁷⁴ Corporate⁷⁵ and other agents,⁷⁶ partners,⁷⁷ mortgagees⁷⁸ and executors of deceased estates⁷⁹ are all subject to equity's standards. In addition, and discussed further below in Part E.2, there are a range of

⁷³ Chapter 3, Part B.3.

⁷⁴ *Barns v Queensland National Bank Ltd* (1906) 3 CLR 925, 943 (the Court); *Wong v Burt* [2004] NZCA 174 [27].

⁷⁵ See eg: *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 838; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1968] Ch 246, 303–07 (Browne-Wilkinson LJ); *Eclairs Group Ltd v JKK Oil & Gas plc* [2015] UKSC 71 [9]–[13] (Lord Sumption). These standards are preserved in the relevant corporations legislation, see eg: Corporations Act 2001 (Cth) ss 181, 185; Companies Act 2006 (Eng) ss 170, 171, 178. See generally: S Worthington, 'Directors' Duties and Improper Purposes' (2016) 75 CLJ 213.

⁷⁶ See eg: *Tobin v Broadbent* (1947) 75 CLR 378; *Reckitt v Barnett, Pembroke & Slater Ltd* [1929] AC 176.

⁷⁷ Equity's standards are given statutory force in Partnership Act 1892 (NSW) s 20(1) and Partnership Act 1892 (NSW) s 5; *National Commercial Banking Corp of Australia Ltd v Batty* (1986) 160 CLR 251, 275 (Brennan J).

⁷⁸ See eg: *Barns* (n74) 943 (the Court), citing *Duke of Portland v Topham* (1864) 11 HL Cas 32, 54. See also: *Selwyn v Garfit* (1888) 38 Ch D 273 (Kay J), *affd* on appeal (1888) 38 Ch D 280 (Cotton LJ, Lindley LJ and Bowen LJ); *Kennedy v De Trafford* [1897] AC 180, 185 (Lord Herschell); *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295, 312–17 (the Board); *Yorkshire Bank plc v Hall* [1999] 1 WLR 1713, 1728 (Walker LJ).

⁷⁹ *Comr Stamp Duties (Qld) v Livingston* [1965] AC 694, 707 (the Board); J Martyn and N Caddick (eds), *Williams, Mortimer and Sunnucks, Executors, Administrations and Probate* (20th edn, Sweet & Maxwell 2013) [83-12]–[83-14].

proprietary claims available across these institutions in response to an exercise of power that fails to meet these standards.

The question arises: what are the potential connections between the assurance of equity's standards by the beneficiary's proprietary claim in the context of express trusts and the assurance of these standards provided by proprietary claims in other institutional contexts? The approach taken in some cases and academic commentaries is that the beneficiary's proprietary claim is indistinguishable from proprietary claims arising in relation to the misapplication of property by other non-trustee fiduciaries.⁸⁰ This question intersects with another debate regarding the extent to which fiduciary relationships outside the express trust can be treated as if they were relationships within an express trust for some purposes. The labels 'quasi-trustee'⁸¹ or 'custodial fiduciary relationship'⁸² are used to identify those fiduciary relationships, such as that between a company and its directors, or an agent and her principal, where the fiduciary has a power over, or custody of, the principal's property.⁸³ These fiduciary relationships are treated as analogous to an express trust for some purposes, such as extending knowing receipt to recipients of corporate property,⁸⁴ and imposing a liability to account upon directors.⁸⁵ Some

⁸⁰ *Clegg v Pache* [2017] EWCA Civ 256 [87] (Briggs LJ; Thirlwall and McCombe JJ agreeing); M Bryan, 'Recipient Liability under the Torrens System: Some Category Errors' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law* (Hart Publishing 2008) 341.

⁸¹ L Tucker, N Poidevin and J Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) [7-018], [41-011].

⁸² As to the use of this term see generally: *Agricultural Land Management Ltd* (n51) [334], [363] (Edelman J); L Sealy, 'The Director as Trustee' (1967) CLJ 83.

⁸³ See eg: *Re Hallett's Estate* (1880) 13 Ch D 696, 709.

⁸⁴ A small sample includes: *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 175 FLR 286 [60]–[64] (Mason P; Stein and Giles JJA agreeing); *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 [254] (the Court); *Agip v (Africa) Ltd v Jackson* [1990] Ch 265, 290 (Millett J); *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, 405 (Buckley LJ; Goff and Waller LJ agreeing), 406–07 (Goff LJ).

⁸⁵ A small sample includes: *Re Sharpe* [1892] 1 Ch 154, 166–67 (Lindley LJ); *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, 277 (Spigelman CJ; Priestley and Meagher JJA agreeing); *Agricultural Land Management* (n51) [363]–[375] (Edelman J). Others have argued that a director's liability to account should be understood as a feature imported from other accounting relationships: J Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 594–95.

academics have argued that the *beneficiary's proprietary claim* should also be extended in favour of companies and principals on the basis of this analogy.⁸⁶

These potential connections, and extensions by analogy, make it necessary for this thesis to explain why a distinction should be maintained between the beneficiary's proprietary claim as it relates to express trusts, and proprietary claims in other contexts. That is the aim of this Part E. The analysis in this Part is necessarily high level as space does not permit detailed engagement. In outline, this thesis' submission is that the beneficiary's proprietary claim is part of a broader phenomenon by which equity assures its standards in the execution of power across a range of institutions to ensure that a given institution functions in line with its respective normative expectations. However, within this phenomenon there are important differences in the assurance regime applicable to different institutions. Equity provides a different strength of assurance depending on the way an institution devolves power.

This submission rests on making out the following propositions: (i) the beneficiary's proprietary claim is part of a broader phenomenon by which equity assures its standards in the execution of power (Part E.2); (ii) there are important differences between particular assurance regimes applicable to an express trust as compared with other institutions, such as companies and agency (Part E.3); (iii) these differences represent equity's calibration of response to the risk profile presented by the institutional method for devolution of power (Part E.4).

2. The beneficiary's proprietary claim is part of a broader phenomenon

There are proprietary claims available in other institutional contexts that have a similar assurance function to the beneficiary's proprietary claim. Across

⁸⁶ R Chambers and J Penner, 'Ignorance' in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008) 271–73; *Lewin on Trusts* (n81) [7-018], [41-011].

companies,⁸⁷ agency,⁸⁸ partnerships,⁸⁹ and administration of deceased estates,⁹⁰ there is a proprietary claim against X, where there is an exercise of power fails to meet one of equity's standards. These claims recognise an equity for relief as if the non-compliant execution had not occurred, which might include restitution of specific property, including the traceable substitute, or its value.

An illustrative example is *Great Investments Ltd v Warner* where a director transferred the company's title to corporate bonds to X to repay the director's personal debt owed to X.⁹¹ X acquired legal title upon registration by the issuing company.⁹² X was required to reconvey title to the bonds to the plaintiff company. The Full Federal Court affirmed that where a director or agent deals with the principal's property outside the terms of the agent's mandate, there are a range of claims available, including a proprietary claim for specific restitution.⁹³

Having regard to the points of correlation between the beneficiary's proprietary claim and proprietary claims in relation to other institutions, it is possible to understand the beneficiary's proprietary claim as forming part of a broader phenomenon by which equity assures its standards in the execution of power. There will be different justifications why the law should be concerned with recognising and supporting various institutions so that a non-compliant exercise of power may have different normative significance across different institutions, and these differences will be discussed further in Chapter 10. But, accepting that a given

⁸⁷ *Great Investments Ltd v Warner* (2016) 243 FCR 516.

⁸⁸ *Tobin* (n76); *Reckitt* (n76); P Watts and F Reynolds (eds), *Bowstead & Reynolds on Agency* (21st edn, Sweet & Maxwell 2018) [8-162].

⁸⁹ See eg: *Sharp v Union Trustee Co of Australia Ltd* (1944) 69 CLR 539, 551 (Rich J); *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, 327–28 (the Court); *Gordon v Gonda* [1955] 1 WLR 885, 894 (Lord Evershed MR). The existence of this equitable proprietary claim was acknowledged by Lord Goff in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 572, but was not pleaded in that case.

⁹⁰ See eg: *Hill v Simpson* (1802) 7 Ves Jun 153, 165–69 (Sir William Grant MR); *Nelson v Larholt* [1948] 1 KB 339, 342–43 (Denning J). The equitable proprietary claim is expressly preserved by statute, see eg: Probate and Administration Act 1898 (NSW) s 95. See generally: *Comr Stamp Duties (Qld) v Livingston* (n79), 713–14 (Lord Radcliffe); *Livingston v Comr Stamp Duties (Qld)* (1960) 107 CLR 411, 453 (Kitto J).

⁹¹ *Great Investments* (n87).

⁹² *Great Investments* (n87) [14], [70].

⁹³ *Great Investments* (n87) [55]–[77].

institution should be recognised by the law, it is then possible to say that where an institution relies upon power for its function, the imposition and assurance of equity's standards can likewise be grounded in the need to preserve the essential feature of an institution. This in turn permits the institution to function in line with the normative expectations informing the law's choice to recognise the institution.

Accepting these arguments, the question thus arises whether the beneficiary's proprietary claim is and should be the same as proprietary claims arising in relation to other institutions. Part E.3 next will demonstrate that there are important structural differences between these claims in terms of the strength of the assurance provided. The beneficiary's proprietary claim is not identical to proprietary claims arising in other institutional contexts and these structural differences demonstrate that equity offers a different strength of assurance across different institutions.

3. Different strengths in assurance provided

The assurance of equity's standards differs in terms of the strength of assurance across different institutions. This can be shown in two ways: (i) the priority of relief; and (ii) the requirement for counter-restitution. Each is discussed next.

i. The priority of relief

The first key difference relates to the priority of the equity recognised in response to a non-compliant execution. Part B.3.ii above explained that the strength of the assurance provided by the beneficiary's proprietary claim is an equitable estate.⁹⁴ By contrast, the proprietary claim available to the company or principal in response to a non-compliant execution generates an equity of a lesser priority status. Australian⁹⁵ and English⁹⁶ case authority tends in favour of the view that the

⁹⁴ See also: Chapter 6, Part D.3.ii.

⁹⁵ *Latec Investments (n13)* 277–79 (Kitto J), 291 (Menzies J); *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, 153 (McLelland AJA); *Robins* (n84) [73]–[75] (Mason P; Stein and Giles JJA agreeing); *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 193 [173]–[206] (the Court); *Grimaldi* (n84) [254], [278]–[280].

⁹⁶ *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 [4].

company (or principal) has a *mere equity* for relief which will be deferred to a later equitable interest acquired in good faith and for valuable consideration.⁹⁷

The significance of this lesser priority status can be demonstrated by an amended version of the facts in *Great Investments v Warner*, whereby the recipient of the corporate bonds, X, executes an equitable assignment in favour of Z. Z has an equitable interest, is innocent and has provided valuable consideration. On these amended facts, the priority of equity's assurance matters. There is a contest between the company's equity for relief in relation to the non-compliant exercise of power by the errant director, and Z. Z will not be able to rely on the plea of bona fide purchaser as Z does not have legal title, nor the benefit of statutory presumptions or apparent authority as she did not deal directly with the company.⁹⁸ Case authority suggests that the company's interest is a mere equity, and that Z's interest will be preferred.⁹⁹

It is acknowledged that the reasoning in *Great Investments Ltd v Warner*,¹⁰⁰ and other cases,¹⁰¹ might support the contrary view that a company or principal has an equitable interest rather than a mere equity in response to a non-compliant execution. This thesis cautions against such an interpretation because, in all of these cases, the availability of relief against X was conditioned on X's knowledge.¹⁰² The significance is that the priority of the equity raised in response to the non-compliant execution did not matter. The company's or principal's equity for relief,

⁹⁷ *Phillips* (n13); *Latec Investments* (n13) 277–79 (Kitto J), 291 (Menzies J). See further: D O'Sullivan, 'The Rule in *Phillips v Phillips*' (2002) 118 LQR 296.

⁹⁸ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 503; *Royal British Bank v Turquand* (1856) 119 ER 474 (QB); Corporations Act 2001 (Cth) ss 127–29; Companies Act 2006 (Eng) s 40(2).

⁹⁹ See nn95–96.

¹⁰⁰ *Great Investments* (n87).

¹⁰¹ Such as: *Tobin* (n76); *Reckitt* (n76); *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474, 479 (Jessel MR); *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467 [25]–[27]; *Belmont Finance Corp* (n84) 405; *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] 1 Lloyd's Rep Bank 511; *Eagle Trust plc v SBC Securities Ltd* [1993] 1 WLR 484.

¹⁰² *Great Investments* (n87) [121]–[122] (the Court); *Tobin* (n76) 398 (Starke J); *Reckitt* (n76) 184 (Lord Dunedin); *Russell* (n101) 479 (Jessel MR); *JJ Harrison (Properties)* (n101) [25]–[27] (Chadwick LJ); *Belmont Finance Corp* (n84) 405; *Heinl* (n101); *Eagle Trust* (n101) 506 (Vinelott J).

whether an equitable interest or mere equity, will take priority where X has knowledge. In *Great Investments Ltd v Warner*, the priority of the company's equity for relief did not matter to the outcome, given X's knowledge; nor was it expressly considered.¹⁰³

Accepting that a company or principal has only a mere equity, this is a key difference between the strength of the assurance applicable across express trusts on the one hand, and companies and agency relationships on the other. In the hypothetical above, the company's mere equity is deferred in favour of Z, and the company will ultimately bear the loss associated with non-compliant exercise of power. In the context of an express trust, B's equity will take priority over the later equitable interest holder, even if for value. X (or Z in a parallel hypothetical) bears the loss associated with the non-compliant exercise of power held subject to an express trust.

Finally, it is acknowledged that the argument in this Part E.3.i is controversial in light of judicial and academic views that a company or principal *will have an equitable interest against X* where there is a non-compliant exercise of power.¹⁰⁴ This thesis accepts that a company or principal may acquire an equitable interest against X. The point of departure is that on this thesis' approach, any equitable interest is conditional upon, and a function of, relief being granted in respect of the company/principal's *mere equity*. *Unless and until* that happens, as recognised before, the company does not have a pre-existing equitable interest independent of its absolute title to property,¹⁰⁵ which reflects the fact that the beneficiary's proprietary claim is *not* available to a company.

¹⁰³ *Great Investments* (n87) [110]–[122].

¹⁰⁴ See eg: R Nolan 'Controlling Fiduciary Power' [2009] CLJ 293, 319; *Lewin on Trusts* (n81) [7-018], [41-011]; Chambers and Penner (n86) 271–72; Bryan (n80) 344, 351.

¹⁰⁵ *DKLR Holding Co (No 2) Pty Ltd v Comr Stamp Duties* [1980] 1 NSWLR 510, 519; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 706. See also: M Conaglen and R Nolan, 'Contracts and Knowing Receipt: Principles and Application' (2013) 129 LQR 359, 378.

Further, some of the cases¹⁰⁶ that might be relied upon to support the contrary view, that the priority of the company's or principal's equity is an equitable interest or estate, are better understood as referring to the company's interest against a *knowing recipient*. As has already been explained in this thesis, knowing receipt is a phenomenon distinct from the beneficiary's proprietary claim. The fact that an analogy can be drawn between express trusts, companies and some agency relationships for the purpose of knowing receipt¹⁰⁷ does not mean that this analogy permits the wholesale importation of the beneficiary's proprietary claim. The limits of any analogy have been recognised before.¹⁰⁸ Gummow J in *Elders Trustee & Executor Co Ltd v EG Reeves* explained, '[i]t has not always been readily appreciated how misleading it is to describe directors as trustees'.¹⁰⁹ This thesis echoes Gummow J's caution, and it is submitted that any analogy between a company and express trust does *not* permit a company to be treated like an express trust when it comes to assurance of equity's standards. The justification for this different treatment will be considered in Part E.4 below.

ii. The requirement for counter-restitution

The second key difference between the assurance regime offered in the express trust context and that in other institutions relates to the requirement for counter-restitution. In the company/agency context, counter-restitution may sometimes be a condition for relief.¹¹⁰ The significance is that in the scenario where the company or principal has not benefited from the non-compliant transaction between it and X, for example because a director diverted the benefit to herself personally, then the loss is borne by the company or principal.

¹⁰⁶ See eg: *Agip* (n84) 290 (Millet J); *Jyske Bank (Gibraltar) Ltd v Spjeldnaes (No 2)* [1999] WL 819062, 9–12.

¹⁰⁷ See n84.

¹⁰⁸ A sample includes: *Knox v Gye* (1872) LR 5 HL 656, 675–676 (Lord Westbury); *Rolled Steel Products (Holdings)* (n75) 304 (Browne-Wilkinson LJ); *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160 [37] (Gummow J); S Worthington, 'Exposing Third-Party Liability in Equity' in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 350.

¹⁰⁹ *Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd* [1987] FCA 603 [152].

¹¹⁰ *Greater Pacific Investments* (n95) 153; *Robins* (n84) [73]–[74] (Mason P; Stein and Giles JJA agreeing), [82] (Giles JA, differing in application of law to the facts and pleaded case).

By contrast, in the express trust context, as discussed in Chapter 8,¹¹¹ counter-restitution is not a pre-condition for B's equity for relief. B is only required to make counter-restitution *to the extent X proves that B or the trust estate has benefited from the transaction between T and X*. Thus, in this context, the loss associated with T acquiring the benefit for herself is not borne by B but by X. Counter-restitution is not a condition to B's claim; rather, it operates as a basis on which X can seek an allowance in her favour, and only to the extent that B (or the trust estate) has received some benefit under the transaction. In the context of the express trust, X will bear the loss associated with a non-compliant execution and effectively underwrite the risk of a non-compliant execution.

4. Calibration of strength of assurance to risk profile

Part E.3 above argued that the strength of assurance differs across express trusts, as compared with agency relationships and companies. This difference is important for understanding how the beneficiary's proprietary claim exists as part of a broader phenomenon by which equity's standards are assured, and yet B's claim remains distinct in relation to the strength of assurance provided.

The further significance of this distinction relates to this thesis' justification for the beneficiary's proprietary claim. Part D above argued that a key factor in justifying the nature and strength of the assurance provided by the beneficiary's proprietary claim is the risk profile presented by the way an express trust devolves power. This argument can be further supported by observing that, for those institutions that devolve power differently, a weaker form of assurance is provided.

Take, for example, a company or agency relationship where power is devolved differently. A director or agent does not have title to the subject property, but rather is conferred a power over the *company's or principal's* title to property. It is submitted that this other method for power devolution presents a different risk profile that justifies the weaker form of assurance in the form of a mere equity, as observed in Part E.3 above. A company or agency relationship presents a different risk profile because: (i) the power-holder cannot present themselves as the owner of property; and (ii) the scope of power is constrained by equity's standards. These are now discussed in turn.

¹¹¹ Chapter 8, Part B.3.ii.e.

i. The power-holder cannot present themselves as the owner of property

First, and generally speaking, an agent or director cannot, depending on the type of property, present themselves as the owner of that property. With the exception for currency and some personal property, the fact of ownership will be made apparent through the process of transfer. This is shown by *Great Investments Ltd v Warner*, where a director transferred a company's title to corporate bonds, in discharge of the director's personal debts. X either knew, or should have known, that the bonds were owned by the company as the company's title was recorded on the transfer forms.¹¹² One implication is that X in this case was precluded from raising the plea of bona fide purchaser as X had, at least, notice of the company's claim.

If power had been devolved differently, and the director were a trustee with title to the subject property, there would have been no indication on the transfer documentation providing notice to X that she was not dealing with the titleholder. X would transact with T as the owner of the property because that is precisely what T is. Unlike the third party who dealt with the company director in *Great Investments Ltd v Warner*, X in the express trust scenario would not necessarily have notice of the existence of the trust. A plea of bona fide purchaser is thus not necessarily precluded in this scenario.

ii. The scope of an agent's power is constrained by the terms of the mandate

The second consequence for the risk profile of an express trust as compared with other institutions relates to the constraints on power. An agent's power is circumscribed by the terms of her mandate.¹¹³ There are important exceptions whereby an agent, or director, can effect a transaction with a third party, despite acting outside the terms of her mandate. Examples include ostensible authority, statutory presumptions and where title passes by registration, as in *Great Investments Ltd v Warner*. But the general default position is that a principal is not bound where the agent acts outside the terms of her mandate.¹¹⁴

¹¹² *Great Investments* (n87) [121]–[122].

¹¹³ See eg: *Reckitt* (n76) 183 (Lord Halisham LC); *Rolled Steel Products (Holdings)* (n75) 304 (Browne-Wilkinson LJ); *Hopkins v TL Dallas Group Ltd* [2004] EWHC 1379 [87]–[97] (Lightman J); *Bowstead & Reynolds on Agency* (n88) articles 71, 75.

¹¹⁴ *ibid.*

The default position is different for T who holds power as an incident of her title. As explained in Chapter 3, and above in Part D.1.i, T's power is *unconstrained* by the trust terms. T can exercise her power in circumstances where an agent may not.

iii. Equity's calibration of response to the institutional risk profile

Accepting that an express trust has a different risk profile as compared with a company and agency relationship, it is submitted that this is the key to understanding the variation in the strength of equity's assurance across these institutions. The variation can be understood as equity calibrating its strength of assurance to the risk profile presented by the particular institutional method for power devolution.¹¹⁵

Further support for this argument can be drawn from the observation that this pattern of calibration maps across other institutions in the same way. When power is held as an incident of title to property, the strength of equity's assurance is the same as in the context of an express trust, an equitable interest, whereas when power is held over another's title to property, the strength of equity's assurance is the same as that provided to a company or principal, an equitable interest.

Take, for example, those institutions that devolve power in a similar way to an express trust, such as a partnership or administration of deceased estates. A partner and a personal representative will each hold title to the subject property and have powers incidental to that title. In both contexts, there are proprietary claims available in response to a non-compliant exercise of power.¹¹⁶ The strength of equity's assurance is the same as an express trust, all ranking as equitable estates.¹¹⁷ The unifying feature across these institutions is that power is held as an incident of title and it is this method of power devolution and its concomitant risk profile that engages and justifies the strength of assurance in the form of an equitable estate.

¹¹⁵ I have made a similar argument in relation to fraud on a power specifically in J Hudson, 'One Thicket in Fraud on a Power' (2019) 39 OJLS (advance online access) <<https://doi.org/10.1093/ojls/gqz017>>.

¹¹⁶ See nn89–90.

¹¹⁷ In relation to deceased estates, see: n90 above. In relation to partnerships, see: n89.

Pausing here, it is acknowledged that comparisons have been made before between the claims for misapplied property in respect of express trusts and deceased estates.¹¹⁸ Professor Lionel Smith has argued that claims in relation to deceased estates ‘exist to ensure the proper distribution of an estate’,¹¹⁹ as distinct from the beneficiary’s proprietary claim which responds to a third party’s interference with B’s equitable title. The availability of proprietary relief to a creditor in relation to misapplication of property from a deceased estate¹²⁰ is relied upon by Professor Smith as a point of distinction. This is because the creditor has no entitlement to the benefit of property of a deceased estate, yet a proprietary claim is available.¹²¹ By contrast, the beneficiary’s proprietary claim, according to Professor Smith, is confined to a beneficiary with an entitlement to the benefit of trust property.

Chapter 7 demonstrated that the beneficiary’s proprietary claim is *not* confined to those objects who have an entitlement to the benefit of trust property. If this thesis’ arguments in Chapter 7 as to the availability of the beneficiary’s proprietary claim to mere objects are accepted, then there is a further point of similarity between the assurance regimes across express trusts and deceased estates. The proprietary claims in both contexts assure the standards in exercise of power, and this is reflected in the availability of the claim to those *without* an entitlement to the benefit of trust property, such as a mere object of an express trust or creditor of a deceased estate.

The final example is that of mortgages. Within this one institution, power can be devolved differently, and the strength of equity’s assurance is calibrated to the particular method deployed. Sometimes the mortgagee’s power of sale is held incidental to the *mortgagee’s title* to the collateral property. As with other institutions that devolve power in this way, equity provides an assurance in the

¹¹⁸ L Smith, ‘Unjust Enrichment, Property and the Structure of Trusts’ (2000) 116 LQR 412, 438–44.

¹¹⁹ *ibid.*

¹²⁰ See also: *Comr Stamp Duties (Qld) v Livingston* (n79) 713–14 (Lord Radcliffe); J Maxton, ‘The Nature of a Beneficiary’s Interest Pending the Administration of an Estate’ (1992) Conv 92.

¹²¹ Smith, ‘Unjust Enrichment, Property and the Structure of Trusts’ (n118) 438.

form of an equitable interest. That interest is referred to as the mortgagor's equity of redemption, and has been recognised as responding to the risk inherent in the mortgagee having title to the collateral property.¹²² In support of this argument is *Harper v Brown* where the New South Wales Court of Appeal expressly acknowledged that there was no difference between the proprietary claim available in relation to T's non-compliant exercise of power in the context of an express trust or a mortgage where the mortgagee has title to the collateral property.¹²³

When a mortgage devolves power differently, and the mortgagee has a power over the *mortgagor's title*, equity re-calibrates its response. In this instance, equity's standards are assured, but there is a weaker assurance in the form of a mere equity for relief.¹²⁴ Thus, this one institution presents further evidence in support of this thesis' argument that a key feature justifying the strength of equity's assurance is the risk profile presented by the institutional method for devolving power. This in turn strengthens this thesis' argument in Part D above that it is the particular risk profile presented by the way power is devolved in an express trust that determines and justifies the strength of equity's assurance as provided by the beneficiary's proprietary claim.

iv. Analogy between the express trust and custodial fiduciary relationships

We return now to the question whether custodial fiduciary relationships can be analogised with express trusts. As explained above in Part E.1, it has been argued by others that a custodial fiduciary relationship can be analogised with an express trust on the basis that they present the same risk of abuse of power, and that a claim to recover property misapplied from a custodial fiduciary relationship should be the same as the trust beneficiary's proprietary claim.¹²⁵

¹²² *Re Wells* [1933] Ch 29, 52 (Lawrence LJ); *Coroneo v Australian Provincial Assurance Association Ltd* (1935) 35 SR (NSW) 391, 394 (Jordan CJ). A different statutory context applies to mortgages in England, see eg: Law of Property Act 1925 (Eng); C Harpum, S Bridge and M Dixon, *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) ch 24.

¹²³ *Harper v Brown* [1887] NSWLR 116, 117–18.

¹²⁴ *Latec Investments* (n13) 277–79 (Kitto J), 291 (Menzies J).

¹²⁵ See eg: *Lewin on Trusts* (n81) [7-018], [41-011].

It is assumed for present purposes that this methodological approach is possible. The point on which this thesis parts company with those who analogise custodial fiduciary relationships with the express trust, is whether there is such an identity of risk in the first place. The analysis above has shown that the express trust, and other institutions that devolve power in the same way, present a different risk profile to those custodial fiduciary relationships where power is held without title. Thus, the same strength of assurance should not be provided across these institutions, and the case law demonstrates that it is not.

F. Conclusion

This Chapter has argued that the function of the beneficiary's proprietary claim is to provide an assurance that power will not be exercised inconsistently with equity's standards. The assurance is that, in the event of a non-compliant execution, relief is available to B as necessary to restore the trust to the position as if there had been no non-compliant execution. The assurance allows B to impose a responsibility on X to meet B's equity for relief. The claim represents one means by which equity implements its commitment to the essential feature of an express trust.

This Chapter has argued that the essential feature of an express trust should be assured by B's claim so that the institution exists in a form that is consistent with its normative expectations. Further, the nature and strength of the assurance can be justified having regard to the risk profile presented by the way in which an express trust devolves power. Support for the significance of the risk profile can be drawn from the fact that there is a similar pattern of assurance of equity's standards for those institutions where power is devolved in the same way as an express trust, such as partnerships and deceased estates. Conversely, where power is devolved differently, there is a re-calibration in equity's response and a weaker assurance is provided in the form of a mere equity for relief, such as in the case of companies and agency.

The broader significance of these observations has been to permit this thesis' placement of the beneficiary's proprietary claim within a broader regime according to which equity's standards are assured by proprietary claims across other institutions. There are, however, important differences between these institutional contexts in terms of the risk profile presented by the institutional method for the

devolution of power. These differences justify the variations in the assurance regimes and tend against analogies being made across institutions that devolve power differently. Chapter 10 will return to these differences in addressing competing accounts of the claim based upon 'lack of authority'.

Chapter 10 – Implications

A. Introduction

This final substantive Chapter examines some of the implications of this thesis' account of the beneficiary's proprietary claim. This Chapter 10 draws on the analysis in Chapters 2–9 to explain why other accounts, being (i) unjust enrichment, (ii) lack of authority and (iii) third-party interference, according to their own terms, fail accurately to explain the beneficiary's proprietary claim. This thesis' arguments in the preceding Chapters will also permit examination of the relationship between overreaching and the beneficiary's proprietary claim, and the question whether the change of position defence *should* be applicable to the beneficiary's proprietary claim. While there is some degree of analytical instability surrounding the change of position defence, it will be argued that this defence should not apply to the beneficiary's proprietary claim.

The arguments in this Chapter will proceed as follows. Part B will explain why unjust enrichment cannot explain the beneficiary's proprietary claim. Part C will explain why this thesis' account should be preferred over other accounts that focus on a lack of authority. Part D will explain why the claim should not be understood in terms of equity's extension of obligations to third parties. Part E will consider the relationship between overreaching and the beneficiary's proprietary claim. Part F will consider the outstanding question whether the change of position defence *should* apply to the beneficiary's proprietary claim.

B. The beneficiary's proprietary claim is not unjust enrichment

1. Outline and approach

As explained in Chapter 2,¹ the unjust enrichment account² distinguishes between B's claim to the *property originally received by X* and the *traceable substitute of the*

¹ Chapter 2, Part D.

² See eg: P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 218–19; P Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 CLP 231; P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 33–34, 64–65; A Burrows, 'Proprietary Restitution:

original. Unjust enrichment scholars agree that B's claim to the original is not unjust enrichment, and is triggered by some other event, such as vindication of proprietary rights.³ B's claim to *the traceable substitute*, on the other hand, is considered to be unjust enrichment.⁴ The problems with reliance on proprietary rights were pointed out in Chapter 2. This Part sets out this thesis' argument why B's claim to the traceable substitute should not be understood as unjust enrichment.

It is first necessary to observe that, as mentioned in Chapter 1,⁵ there is some instability as to the role and concept of unjust enrichment, particularly in Australia. It is not necessary for this thesis to resolve these issues as this thesis takes the position that unjust enrichment is not relevant to the beneficiary's proprietary claim. The following analysis will demonstrate that the unjust enrichment account of the beneficiary's proprietary claim does not account for the claim, *according to its own terms*. The analysis will assume the structural elements and normative concern of unjust enrichment as identified by the unjust enrichment account of the beneficiary's proprietary claim. This thesis should not, however, be understood as adopting a particular view on the role and meaning of unjust enrichment, and it is acknowledged that, in addition to the uncertainties in Australian law, there is continued academic debate in this area.⁶

In summary, this Part B will argue that the beneficiary's proprietary claim to the traceable substitute is not triggered by the event of unjust enrichment for three reasons: (i) the beneficiary's proprietary claim does not fit within the framework of unjust enrichment (Part B.2); (ii) the beneficiary's proprietary claim responds to

Unmasking Unjust Enrichment' (2001) 117 LQR 412, 417; A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 169–98, 432–33; C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) [8-163]–[8-165]; R Chambers, 'Tracing and Unjust Enrichment' in J Neyers (ed), *Understanding Unjust Enrichment* (Hart Publishing 2004) 279–94.

³ See eg: Burrows, *The Law of Restitution* (n2) 13, 169; Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (n2) 417; Birks, 'Receipt' (n2) 215–17.

⁴ See n2.

⁵ Chapter 1, Part C.2.ii.b.

⁶ A small sample includes: R Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 511; L Smith, 'Restitution: A New Start?' in P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2018) ch 5.

different reasons to those informing unjust enrichment (Part B.3); and (iii) the claim cannot be understood in terms of a policy-motivated unjust factor (Part B.4). Each reason is discussed in more detail next.

A final preliminary observation is that the issues in this Part intersect with another debate over whether there is, or should be, a separate personal claim for restitution of the value of misapplied trust property based on unjust enrichment against X.⁷ This thesis does not engage further with this issue. The analysis in this Part may, however, have future relevance to this issue.

2. The beneficiary's proprietary claim does not fit within the framework of unjust enrichment

The unjust enrichment account of B's claim depends upon being able to show that the beneficiary's proprietary claim is analogous to a claim in mistake.⁸ The methodological assumption informing this approach is that a claim in mistake is the core example of unjust enrichment. In turn, B's claim to the traceable substitute should be understood as arising in response to unjust enrichment if it can be shown that B's claim is analogous to mistake. This analogy depends upon demonstrating that the beneficiary's proprietary claim fits within the unjust enrichment framework, and defines the same normative concerns or reasons for restitution as mistake. An example of this argument is that given by Professor Birks who argued:

If D uses money from a trust fund and buys himself a Jaguar car, he can be said to have enriched himself at the expense of the beneficiaries. He has enriched himself by acquiring a valuable chattel, which he himself chose to obtain. That enrichment can be said to have been obtained at the beneficiaries' expense, because, although the Jaguar was never theirs, nevertheless it was obtained using their money and there is an unjust factor in the absence of their consent.⁹

This thesis will assume that this methodological approach is possible and, as mentioned already, will assume the framework for unjust enrichment as defined by

⁷ A small sample of academic literature on this issue includes: Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in W Cornish, R Nolan, J O'Sullivan and G Virgo (eds), *Restitution, Past Present and Future* (Hart Publishing 1998) 231, 237; Birks, 'Receipt' (n2) 222.

⁸ P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1985) 140–41; R Chambers and J Penner, 'Ignorance' in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008) 255; C Webb, *Reason and Restitution* (OUP 2018) 16.

⁹ Birks, 'Receipt' (n2) 218–19.

those applying it to the beneficiary's proprietary claim. This thesis will also assume the normative concern(s) or reasons that have previously been identified as informing unjust enrichment, albeit it will be necessary to acknowledge some further controversies in this regard in relation to policy-motivated factors in Part B.4 below.

This Part B.2 will use this thesis' account of the beneficiary's proprietary claim developed in the preceding Chapter to explain why the claim does not fit within the framework that identifies the event of unjust enrichment. To do this, it will be necessary to explain: (i) the framework used to understand the beneficiary's proprietary claim as responding to unjust enrichment (Part B.2.i); and (ii) why the beneficiary's proprietary claim does not fit within this framework (Parts B.2.ii–iii).

i. The unjust enrichment framework

The framework adopted by the unjust enrichment account to show that the beneficiary's proprietary claim is analogous to a claim in mistake by showing that B's claim satisfies a set of inquiries, which ask: (i) has the defendant ('D') been enriched? (ii) was the enrichment at the expense of the claimant ('C')? (iii) was the enrichment unjust? and (iv) do any defences apply, such as change of position?¹⁰

It is important to acknowledge there is uncertainty in relation to the significance of this framework and its inquiries.¹¹ For example, these inquiries have been understood to define the elements 'expressed in broad terms'¹² or the 'central

¹⁰ See n2. These inquiries have been recognised as relevant to understanding a claim for restitution based on unjust enrichment, see eg: *Banque Financière de la Cité v Parc (Battersea Ltd)* [1999] 1 AC 221, 227 (Lord Steyn), 234 (Lord Hoffman); *Investment Trust Companies v Revenue and Customs Comrs* [2018] AC 275 [41] (Lord Reed; Lord Neuberger, Lord Mance, Lord Carnwath and Lord Hodge agreeing). In Australia there is some judicial recognition of the relevance of these enquiries, see eg: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 [30] (French CJ, Crennan and Kiefel JJ); *Goff & Jones* (n2) [1-09]–[1-35].

¹¹ It has been argued that there is a further inquiry, which is whether there is a juristic reason for X to retain the enrichment: J Edelman and E Bant, *Unjust Enrichment* (2nd edn, Hart Publishing 2016) 130–39.

¹² *Investment Trust Companies* (n10) [41].

issues’¹³ to a cause of action in unjust enrichment, rather than ‘legal tests’.¹⁴ In Australia, unjust enrichment has been rejected as an independent cause of action, leaving further uncertainty about the role and legal significance of these inquiries, and the concept of unjust enrichment.¹⁵ These issues are beyond resolution here. What is important is that the inquiries outlined in the paragraph above are accepted by the unjust enrichment account as defining the framework according to which the beneficiary’s proprietary claim is considered analogous with mistake and thus part of unjust enrichment.

This unjust enrichment framework has been given further context and definition by a normative account of unjust enrichment referred to as *corrective justice*. *Corrective justice* has received some judicial¹⁶ and academic¹⁷ support as informing unjust enrichment. Set out now is a brief outline of how corrective justice gives substance and context to the unjust enrichment framework considered applicable to the beneficiary’s proprietary claim.

¹³ Edelman and Bant (n11) 29.

¹⁴ *Investment Trust Companies* (n10) [41].

¹⁵ See eg: *David Securities* (n10) 378–79 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 406 (Dawson J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [151] (the Court); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 [83]–[85] (Gummow, Hayne, Crennan and Kiefel JJ); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 [85]–[95]; *Equuscorp* (n10) [29]–[30]; *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 [73]–[78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

¹⁶ *Investment Trust Companies* (n10) [42] (Lord Reed; Lord Neuberger, Lord Mance, Lord Carnwath and Lord Hodge agreeing); *Prudential Assurance Co Ltd v Revenue and Customs Comrs* [2018] UKSC 39 [68] (Lord Mance, Lord Reed and Lord Hodge; Lord Sumption and Lord Carnwath agreeing); *Kingsway Investments v New Brunswick (Dept Finance)* [2007] 1 SCR 3 [32] (Bastarache J); *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762, 804 (McLachlin J).

¹⁷ E Weinrib, ‘The Normative Structure of Unjust Enrichment’ in R Grantham and C Rickett (eds), *Structure and Justification in Private Law* (Hart Publishing 2008) 21–45; L Smith, ‘Restitution: The Heart of Corrective Justice’ (2001) 79 Texas L Rev 2115; E Weinrib, ‘Correctively Unjust Enrichment’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of Unjust Enrichment* (OUP 2009) ch 2; Webb (n8); M McInnes, ‘The Measure of Restitution’ [2002] 52 UTLJ 163, 186–89; K Barker, ‘Understanding the Unjust Enrichment Principles in Private Law: A Study of the Concept and its Reasons’ in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing 2004) 97–106.

Corrective justice refers to a notion of interpersonal justice that requires the parties to be returned to a state of pre-transactional equality or equilibrium where there has been a normatively defective transfer. Corrective justice has been used to explicate some aspects of private law that ‘protect ... and defend ... that which is common to all of us: our ability to make choices in our lives and our corresponding duty to allow others to do the same’.¹⁸ A particular contribution of corrective justice is to explain that D can be liable to C despite an absence of fault on D’s part¹⁹ on the basis of a ‘nexus of exchange’.²⁰ This nexus identifies D as the legal person who has gained from C’s normative loss.²¹ Professor Lionel Smith explains that the nexus of exchange is the only way to justify liability in unjust enrichment where the normative defect arises independent of D’s wrongdoing.²²

Corrective justice demands a formal structure for a claim in unjust enrichment; this consists of: (1) a nexus of exchange between C and D that is normatively defective; and (2) restoration of the parties to their pre-transactional equality. Transposing this formal structure to the unjust enrichment framework set out above, the first component, a nexus of exchange, is defined by the first three areas of inquiry in the unjust enrichment framework: (i) has D been enriched? (ii) was the enrichment at C’s expense, and (iii) was the enrichment unjust? Change of position and other defences are relevant to the second aspect of the formal structure.

Having set out the unjust enrichment framework and how it is informed by the formal requirements of corrective justice, it is now possible to use this thesis’ account of the beneficiary’s proprietary claim to demonstrate three reasons why the beneficiary’s proprietary claim neither fits within the unjust enrichment framework nor satisfies the formal requirements demanded by corrective justice. *First*, the beneficiary’s proprietary claim cannot satisfy the ‘at the expense of’ inquiry and there is no nexus of exchange between B and X (Part B.2.ii). *Second*, the beneficiary’s proprietary claim does not meet the other formal requirement of corrective justice, as the claim does not restore the parties to their pre-

¹⁸ Smith, ‘Restitution: The Heart of Corrective Justice’ (n17) 2117.

¹⁹ See eg: Smith, ‘Restitution: The Heart of Corrective Justice’ (n17) 2115; Weinrib, ‘Correctively Unjust Enrichment’ (n17) ch 2.

²⁰ Smith, ‘Restitution: The Heart of Corrective Justice’ (n17) 2141–42.

²¹ *ibid.*

²² *ibid.*

transactional states of equality (Part B.2.iii). *Third*, the unjust factors do not apply to the beneficiary's proprietary claim. The beneficiary's proprietary claim is concerned with a set of reasons for restitution that are distinct from the interpersonal justice considered relevant to unjust enrichment (Part B.3).

ii. *There is no nexus of exchange*

The first component of the formal structure of unjust enrichment, a nexus of exchange, is defined by the first two areas of inquiry in the unjust enrichment framework: (i) has D been enriched? And (ii) was the enrichment at C's expense? This thesis accepts that the first inquiry, (i) enrichment, may be satisfied in relation to the beneficiary's proprietary claim, as X has received and retained the subject property.²³ The key points of contention relate to the 'at the expense of' inquiry (ii), which is addressed in this Part B.2.ii, and the unjust factor (iii), which will be addressed in Part B.3 below.

A claim in unjust enrichment requires D's enrichment to have been at C's expense.²⁴ This requirement, together with D's enrichment, identifies the requisite nexus of exchange between C and D that explains why D is liable to C. There is a degree of analytical instability concerning the 'at the expense of' inquiry, and what exactly is required for its satisfaction.²⁵ Nonetheless, it is possible to show that the 'at the expense of' requirement is not made out when applied to the beneficiary's proprietary claim because: (a) there is no direct transfer between B and X; (b) reliance on B's proprietary rights does not suffice; and (c) X's substitution is not relevant. These reasons are addressed now.

a. *No direct transfer between B and X*

To the extent that the 'at the expense of' inquiry does require a direct transfer between C and D,²⁶ the beneficiary's proprietary claim cannot be accounted for as unjust enrichment. The relevant transfer is between T and X, not the claimant B and

²³ Although others argue that the enrichment inquiry is not satisfied when B retains an equitable title: W Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 OJLS 627.

²⁴ *Investment Trust Companies* (n10) [43]; *Goff & Jones* (n2) ch 6.

²⁵ See eg: *Investment Trust Companies* (n10) [40]–[66].

²⁶ See eg: Smith, 'Restitution: The Heart of Corrective Justice' (n17) 2147–48, 2158.

the defendant X. X has not received anything *from B*. This difficulty for the unjust enrichment account has been identified before.²⁷

b. Reliance on B's equitable proprietary rights

One approach which has been proposed to permit the unjust enrichment account to keep faith with the 'at the expense of' requirement is to rely on B's equitable proprietary rights to demonstrate a sufficient nexus between X and B.²⁸ According to this solution, B's equitable proprietary rights negate the need to show a direct transfer or series of coordinated transactions. The 'at the expense of' inquiry is satisfied when X substitutes the original property because the original property is the subject of B's equitable proprietary rights.²⁹

Observe how this solution relies on the metaphors of equitable ownership and equitable proprietary rights to demonstrate that B has a proprietary right to the property received and later substituted by X. The problems with this reliance were pointed out in Chapter 2. In addition to these problems, this solution lacks sensitivity to the formal structure of the express trust.³⁰ According to that structure, it is T who has title to the trust property, and it is only T at whose expense X receives value or rights.³¹ Chapter 6 demonstrated that B does *not* have a proprietary right

²⁷ A sample includes: W Swadling, 'The Nature of Knowing Receipt' in P Davies and J Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 318–22; B McFarlane, 'Unjust Enrichment, Property Rights, and Indirect Recipients' (2009) 17 RLR 37, 54–55; L Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412, 428–29.

²⁸ See n2; *Investment Trust Companies* (n10) [48] (Lord Reed; Lord Neuberger, Lord Mance, Lord Carnwath and Lord Hodge agreeing).

²⁹ *Goff & Jones* (n2) [8-163]–[8-165]; Chambers, 'Tracing and Unjust Enrichment' (n2) 279–94; Birks, 'Receipt' (n2) 218–19.

³⁰ The 'false identity between common law title and the rights of a beneficiary under a trust' has been cautioned against before, see eg: S Degeling and J Edelman, 'What is an Unjust Factor?' in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008) 194; L Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (n27) 433–34, including in this thesis in Chapter 2.

³¹ There is debate over whether rights or value can constitute enrichment, see eg: R Chambers, 'Two Kinds of Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009); A Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart Publishing 2012). The point is that in the context of the beneficiary's proprietary claim, X does not receive value or rights *at B's expense*.

in property received and substituted by X capable of supporting the unjust enrichment account. That Chapter argued that X does not owe a duty to return property to B, and B has no absolute *right*, proprietary or otherwise, to property retained by X. X's enrichment via receipt and substitution is thus not at B's expense.³² Further, it is possible to say that X's acquisition of the substitute is acquired with the value inherent in the property originally received should not matter. B does not have an absolute right to the original property or its inherent (exchange) value, and thus X's substitution is not at B's expense.

c. X's substitution is not relevant

The next variant in the unjust enrichment account is that X's substitution extinguishes B's interest in the original property, and this extinction satisfies the 'at the expense of' inquiry. As mentioned already, this argument is predicated upon B's interest being *proprietary*³³ and the assumption that B's 'proprietary' right relates only to specific property. The implication is that a change in the form of the property extinguishes B's original proprietary right.

Again, the problem with this approach is that it relies upon B actually having a proprietary right in the first place. Accepting this thesis' arguments in Chapters 2 and 6, B does not have a proprietary *right* to the property received by X. Thus, the principles applicable to the transmissibility and extinguishment of proprietary rights do not apply. It is not necessarily the case that B's interest *is* extinguished by X's substitution.

As discussed in Chapter 6,³⁴ the position taken in this thesis is that B's interest is better understood as a power to impose a liability on X to court orders requiring X to satisfy B's claim where X has property identified as either the original or the traceable substitute. The interest represented by this power and its content do not change, unless and until no property at all can be identified. Thus, X's substitution of itself does not extinguish B's interest, and cannot be identified as satisfying the 'at the expense of' inquiry.

³² Chapter 6, Part C.

³³ See n2.

³⁴ Chapter 6, Part C.4.

In the scenario where X deals with the property so that there is no traceable substitute (for example, by destruction or consumption), *then* B's power and X's liability are extinguished as they are contingent upon X's retention of specific property.³⁵ This extinction, however, does not mean that B's claim can be understood in terms of unjust enrichment because in this scenario, B's claim is not applicable. There is no property that can be subject to B's claim. There may be a separate question whether X should repay the value of the property on the basis of unjust enrichment.³⁶ As noted above in Part B, resolution of this question is beyond scope of this thesis.

Accepting that the 'at the expense of' inquiry is not made out, and there is no nexus of exchange in relation to the beneficiary's proprietary claim, these arguments should be sufficient to demonstrate a fatal flaw in the unjust enrichment account of the beneficiary's proprietary claim. It is possible to go further in Part B.2.iii next and show that the beneficiary's proprietary claim does not meet the other formal requirement of corrective justice, as the beneficiary's proprietary claim does not restore the parties to their pre-transactional states of equality.

iii. Claim does not restore X to pre-transactional state as X may be left worse off

The second reason the beneficiary's proprietary claim should not be understood as unjust enrichment is that the claim fails the other formal requirement of corrective justice, which is that the parties must be restored to their pre-transactional states of equilibrium. Unjust enrichment is structurally and normatively conditioned on the defendant *not* being left in a worse position after making restitution.³⁷

The beneficiary's proprietary claim, on the other hand, recognises an equity in B's favour and corresponding responsibility on X that may leave X worse off. This is

³⁵ Chapter 6, Part D.

³⁶ See eg: Degeling and Edelman, 'What is an Unjust Factor?' (n30) 194–95; Edelman and Bant (n11) 290.

³⁷ Smith, 'Restitution: The Heart of Corrective Justice' (n17) 2147–48; R Grantham and C Rickett, 'A Normative Account of Defences to Restitutionary Liability' (2008) 67 CLJ 92, 121–24. See also, Birks, *Unjust Enrichment* (n2) 208–09.

illustrated by those cases³⁸ where X is the purchaser of a later equitable interest, without notice, and that interest is deferred in priority to B's claim. Further, and as explained in Chapter 8,³⁹ X's liability may be reduced, but only to the extent that X can show that B or the trust estate received some benefit from X. Thus, in the scenario where B or the trust estate has *not* benefited, for example where X has advanced funds to T (or the appointee, as in *Cloutte v Storey*), X will be left in a worse position by the beneficiary's proprietary claim. The beneficiary's proprietary claim does not restore the parties to their pre-transactional states of equilibrium. As explained in Chapter 9, the claim allows B to allocate the responsibility of assuring equity's standards to X. X effectively underwrites equity's commitment to the essential feature of the express trust in a way that may leave X worse off.

Finally, it is acknowledged that there remains the question whether X *should* be left worse off after satisfying B's equity for relief; this agitates the change of position issue, considered in Part F below. This issue takes on a heightened significance in light of X's strict responsibility, as discussed in Chapter 6.⁴⁰ The point for now is that the effect and operation of B's claim, as evidenced by the cases, is that X may be left worse off and this is a further reason why the claim should not be understood as unjust enrichment.

Considered next are the arguments why the beneficiary's proprietary claim: (i) responds to different reasons to those informing unjust enrichment (Part B.3); and (ii) cannot be understood as unjust enrichment on the basis of a policy-motivated unjust factor approach (Part B.4).

3. B's claim responds to reasons that are different to unjust enrichment

The unjust enrichment account asserts that the beneficiary's proprietary claim is normatively akin to, or concerned with the same reasons for restitution, as a claim in mistake. This Part B.3 will explain the problem with this approach. Set out now are: (i) the normative reasons informing unjust enrichment (Part B.3.i); and (ii) the

³⁸ See eg: *Cloutte v Storey* [1911] 1 Ch 18; *Dudley v Champion* [1893] 1 Ch 101; *Stroughill v Anstey* (1852) 22 LJ Ch 130.

³⁹ Chapter 8, Part B.3.ii.e.

⁴⁰ Chapter 6, Part D.

distinction between the normative reasons informing unjust enrichment and those relevant to the beneficiary's proprietary claim (Part B.3.ii).

i. Normative reasons informing unjust enrichment

One source of normative input considered relevant to unjust enrichment are the parties' Kantian rights as self-determining agents.⁴¹ This expresses a sense of interpersonal justice according to which 'the parties each have an entitlement to what is one's own until one freely parts with it'.⁴² This norm is identified as informing the consent-related unjust factors⁴³ that protect the integrity of C's choices.⁴⁴ The idea is that C should only be held to transfers to which she properly consents, and should be able to reverse transactions to which she does not. Thus, a transfer that occurs without C's unqualified, true or properly formed consent, such as a mistaken payment, is normatively defective and requires correction.

According to the unjust enrichment account, the beneficiary's proprietary claim is assumed to be concerned with the same sense of interpersonal justice as unjust enrichment,⁴⁵ and is infringed because X's acquisition of the traceable substitute occurs *without B's consent or B's authority*.⁴⁶ The authors of *Goff & Jones*, for

⁴¹ Weinrib, 'Correctively Unjust Enrichment' (n17) 46–52; Weinrib, 'The Normative Structure of Unjust Enrichment' (n17) 35; Smith, 'Restitution: The Heart of Corrective Justice' (n17) 2141–44; McInnes (n17) 186–89. Excepting unjust enrichment for policy-motivated unjust factors, which identify different normative defects (and pre-transactional equality) that are not informed by Kantian notions of right, see eg: Smith, 'Restitution: The Heart of Corrective Justice' (n17) 2144–45; S Degeling, 'Understanding Policy-motivated Unjust Factors' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing 2008) 280–82.

⁴² Weinrib, 'The Normative Structure of Unjust Enrichment' (n17) 35. See also: Webb (n8) 86–90.

⁴³ Smith, 'Restitution: The Heart of Corrective Justice' (n17) 2141–44; Weinrib, 'The Normative Structure of Unjust Enrichment' (n17) 35; McInnes (n17) 188.

⁴⁴ Smith, 'Restitution: A New Start?' (n6) 110–13.

⁴⁵ See n2.

⁴⁶ There is some limited case recognition of this unjust factor in relation to misapplication of corporate property, as in *Relfo Ltd v Jadvavarsani* [2012] EWHC 2168 [86]; *Relfo Ltd v Varsani* [2014] EWCA Civ 360 [108] (Floyd LJ). See also: *Goff & Jones* (n2) [8-149]–[8-165]. Note that there are other 'lack of authority' accounts outside unjust enrichment, and which are considered further below in Part C, or as a policy-motivated factor, considered in Part B.4 next.

example, explain that X's enrichment is unjust 'because ex hypothesi it occurs without the beneficiary's consent'.⁴⁷ The lack of B's consent permits the analogy with a claim in mistake. If C can recover money she has transferred by mistake, then she should be able to recover when her consent is entirely absent.

ii. *The distinction between the normative reasons informing unjust enrichment and the beneficiary's proprietary claim*

This thesis does not question the underlying premise of the unjust enrichment account, that like cases should be treated alike, and further, that similarity in reasons is what makes a case materially like another.⁴⁸ Nor does this thesis question the proposition that a reason for restitution for unjust enrichment is to protect the integrity of C's choices. The point of difference is that the beneficiary's proprietary claim is *not* concerned with protecting the integrity of B's choices. The beneficiary's proprietary claim responds to a different reason for restitution, and thus is not analogous to a claim in mistake. This can be demonstrated in two ways: (a) the beneficiary's proprietary claim implements equity's institutional commitment to the express trust; and (b) a non-compliant execution, and X's subsequent substitution, do not reveal transactions of concern to unjust enrichment.

a. *The beneficiary's proprietary claim implements equity's institutional commitment to the express trust*

For the reasons set out in Chapter 9, the position taken in this thesis is that the beneficiary's proprietary claim implements equity's institutional commitment to the essential feature of an express trust by assuring equity's standards. The claim is *not* concerned with reasons that are interpersonal between B and X, and in particular is not concerned with B's consent. There is thus no normative alignment between the beneficiary's proprietary claim and a claim in mistake.

b. *A non-compliant execution does not reveal a transaction of concern to unjust enrichment*

In addition to relying upon this thesis' account of the normative reasons motivating the beneficiary's proprietary claim, it is also possible to show that, properly

⁴⁷ Goff & Jones (n2) [8-165].

⁴⁸ See eg: J Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 203; Webb (n8) 44–48; Smith, 'Restitution: A New Start?' (n6) 110.

understood, a non-compliant execution and X's subsequent substitution do not reveal transactions of concern to unjust enrichment. The normative reason informing unjust enrichment is thus, according to its own terms, not applicable to the circumstances of the beneficiary's proprietary claim.

As explained above, unjust enrichment exhibits a concern for the integrity of C's choices. There are, however, limits to the law's concern for C's (and B's) consent and not all of C's choices are protected. Restitution is *not* available whenever any transaction occurs that C can identify as being without her consent in some way. C's consent only matters to a transaction involving a transfer of C's wealth or assets.⁴⁹ If D receives an enrichment which C has *no* interest in determining the allocation of,⁵⁰ C's consent is irrelevant. In such a case, the fact that C may not have known about or consented to such a transaction does *not* mean there is a normative defect relevant to unjust enrichment.

Applying these parameters to the beneficiary's proprietary claim, it can be seen that a non-compliant execution by T/D and any subsequent substitution by X are *not* normatively defective transactions in a sense relevant to unjust enrichment. A non-compliant execution can be generally described as defective; however, the *reason* why it is defective is different to the reason why a mistaken transfer is defective. This point will be discussed further in relation to, *first*, T's non-compliant exercise of power to transfer property to X, and *second*, X's subsequent substitution.

T's non-compliant exercise of power to transfer property to X – B's consent, or lack of it, is irrelevant to this transaction because B has no right to exclusively determine the allocation of the property received by X from T/D. At most, B has a power to call for the trust property from T, if she is absolutely entitled and *sui juris*.⁵¹ This power, assuming B has it, does not give B a right to exclusively determine the enjoyment of trust property. Thus, B's consent or lack of it is irrelevant to any non-compliant exercise of power *by T/D*.

⁴⁹ Weinrib, 'Correctively Unjust Enrichment' (n17) 40; Webb (n8) 60–77.

⁵⁰ Webb (n8) 65–66.

⁵¹ Discussed in Chapter 2, Part C.2.i.

Other scholars have previously relied upon B's equitable proprietary rights to engage the concern for B's consent.⁵² As was explained in more detail in Chapters 2 and 6, the problem is that B does not have a proprietary right in the sense necessary to make her consent, or a lack of it, normatively significant to the initial transaction between T/D and X.

X's subsequent substitution – B's consent is not relevant to X's substitution. X is the titleholder to the subject property, and it is X's consent, not B's, that is relevant to the substitution. B does have an interest in the property received and substituted by X, and this is asserted by the beneficiary's proprietary claim. This interest does not, however, make B's consent relevant. As explained in Chapter 6,⁵³ the precise content of B's interest that is asserted by the beneficiary's proprietary claim is not an absolute right, but an equity for relief that corresponds to X's liability to court orders. Unless and until those orders are made, B has no right or interest to exclusively determine the enjoyment of the subject property. Thus, any subsequent substitution by X is a transaction for which B's consent, or lack of it, is irrelevant.

Finally, B may have a power to authorise or consent to a non-compliant exercise of power. This does not, however, mean that B's consent has significance to a non-compliant execution, for two reasons. *First*, B may not always have this power, depending on the trust terms, and the claim is available when B does *not* have this power, as exemplified by those cases where B is the object of a discretionary power, or a party interested in a charitable trust seeking recovery of charitable trust property on behalf of the trust.⁵⁴

Second, even when B does have such a power, this does not amount to B having an interest sufficient to render B's consent relevant to the transaction between T and X. As mentioned before in this thesis,⁵⁵ B's power of consent or authorisation varies the terms of the mandate by which T holds power. B's authorisation means that T's subsequent exercise of power to transfer trust property to X, which would have been contrary to the trust mandate, is permitted. B's consent is not relevant to the

⁵² See Part B.2.ii.b above.

⁵³ Chapter 6, Part C.

⁵⁴ Chapter 7, Part B.

⁵⁵ Chapter 8, Part B.3.ii.c.

subsequent exercise of power *by T*. Likewise, X's later substitution is an exercise of power by X to which B's consent is irrelevant. Thus, even in the scenario where B does have the power to vary the trust mandate, this does not undermine this Part's argument that B's consent is irrelevant to the transaction between T and X, and X's subsequent substitution.⁵⁶

In summary, and drawing on the analysis in the preceding Chapters, a non-compliant execution presents a different normative problem to a mistaken transfer. The beneficiary's proprietary claim responds to a reason that is *not* akin to the reasons identified by unjust enrichment.

4. A policy-motivated unjust factor approach?

To complete this thesis' argument why the beneficiary's proprietary claim should not be understood as unjust enrichment, it is necessary to consider whether the claim can be understood in terms of a policy-motivated unjust factor based on an unauthorised⁵⁷ or non-compliant execution. Before doing this, it is first necessary to point out that the status of policy-motivated claims within unjust enrichment is contested.⁵⁸ Thus, before the beneficiary's proprietary claim could be understood as a policy-motivated unjust factor, it would be necessary for the law to admit any applicable policy-motivated factor as part of the law of unjust enrichment *and* the availability of a proprietary response. This thesis does not seek to resolve these questions about the status of policy-motivated claims. The following discussion will demonstrate why the beneficiary's proprietary claim cannot be understood as unjust enrichment, even as a policy-motivated claim. There are two reasons for this argument.

First, the model of liability evidenced by the claim does not fit the formal structure of unjust enrichment. Policy-motivated claims, if admitted as part of unjust enrichment, must follow or align with the unjust enrichment framework set out in Part B above.⁵⁹ For reasons discussed in Part B.2 above, the beneficiary's

⁵⁶ See also: Chambers and Penner (n8) 257–58.

⁵⁷ See eg: Degeling and Edelman, 'What is an Unjust Factor?' (n30) 186, 194–95.

⁵⁸ S Degeling, 'A New Reason for Restitution: The Policy against Accumulation' (2002) 22 OJLS 435; Degeling and Edelman, 'What is an Unjust Factor?' (n30) 186, 194–95, although see now: Edelman and Bant (n11) 28–29, ch 13.

⁵⁹ Degeling, 'Understanding Policy-motivated Unjust Factors' (n41) 290.

proprietary claim does not align with that framework. The claim does not restore the parties to their pre-transactional state of equilibrium as X may be left worse off. Thus, even if a non-compliant execution were admitted as a policy-motivated unjust factor, the beneficiary's proprietary claim could not be understood as part of that phenomenon.

Second, a subsequent substitution by X cannot be understood in terms of another potential policy-motivated unjust factor, labelled 'lack of authority' or an 'unauthorised transaction'. That is because an exercise of power can only be unauthorised if it is subject to constraints upon its exercise. X is *not*, however, constrained in her exercise of power. It is possible to say in a very general sense that X's substitution is unauthorised because the trust terms do not permit X to have the original property, let alone substitute it. However, X does not hold her title subject to the terms of the trust. X, as the owner of property, is *unconstrained* in the exercise of her powers, including exercise of her power to substitute that property. This point will be discussed further in Part C in relation to the 'lack of authority' account of the beneficiary's proprietary claim that exists outside unjust enrichment.

C. Lack of authority outside unjust enrichment

1. Outline

There is another account of the beneficiary's proprietary claim which understand the claim as a response to a 'lack of authority' which sits outside unjust enrichment. Within this account, there are two divergent approaches to the concept of an unauthorised transaction and its significance. It is important to differentiate them to permit this thesis' explanation why neither can account for the beneficiary's proprietary claim.

The *first* variant focuses on a conception of authority that requires the power-holder to perform her duties that attend the exercise of power.⁶⁰ The *second* variant focuses on a conception of authority that relies on B's proprietary rights.⁶¹

⁶⁰ A Nair, *Claims to Traceable Proceeds: Law, Equity and the Control of Assets* (OUP 2018).

⁶¹ See eg: Chambers and Penner (n8) 257, 262; P Jaffey, 'Explaining the Trust' (2015) 131 LQR 377, 389, 395. See also: P Jaffey, *Private Law and Property Claims* (Hart Publishing 2007) 18, 155–57.

For the reasons set out next, neither of these accounts explains the beneficiary's proprietary claim.

2. Authority as a breach of duty

The first variant, proposed by Dr Nair, focuses on T/D's *unauthorised* exercise of power, and X's *unauthorised* substitution, as the reasons for B's claim to the traceable substitute(s).⁶² *Authority*, as that term is used by Dr Nair, presumes the existence, and prior application, of a duty that constrains the power-holder in her exercise of power. An *unauthorised* exercise of power is an execution that involves a breach of duty. There are two key problems with this account: (i) the beneficiary's proprietary claim is not a response to a breach of duty by T; and (ii) X's substitution is not unauthorised in the sense defined by Dr Nair.

i. The beneficiary's proprietary claim is not a response to a breach of duty by T

The first problem for Dr Nair's account is that her conception of authority does not align with the principles relevant to the beneficiary's proprietary claim. Chapters 3–5 of this thesis demonstrated that the claim arises in response to a non-compliant execution, which is an exercise of power that fails to meet one or more of equity's standards. In particular, the claim is not a response to a breach of duty by T/D.⁶³ Thus, Dr Nair has incorrectly understood the beneficiary's proprietary claim as a response to a breach of duty, and her conception of authority cannot account for the beneficiary's proprietary claim.

ii. X's substitution is not unauthorised

The second problem is that, on Dr Nair's conception of authority, X's substitution is *not* unauthorised. Dr Nair argues that X's substitution is unauthorised because X breaches a 'negative duty not to keep the assets for her own benefit'.⁶⁴ However, properly understood, X is not subject to any duty or any other constraint in relation to the exercise of her powers as titleholder to the property received from T.

⁶² Nair (n60) [6.62]–[6.84], ch 7.

⁶³ Chapter 5.

⁶⁴ Nair (n60) [7.26].

Chapter 6 showed that X is liable to court orders, not a duty.⁶⁵ This liability does not constrain X in the exercise of her powers as the titleholder. Prior to any court orders being made, X is free to consume, destroy or substitute that property; in so doing, X neither breaches any antecedent duty to B nor infringes any standard or constraint upon her powers. X's liability does not render X a constructive trustee in the sense that she is subject to the trust terms. Nor does X's liability impose upon X a duty of non-interference according to which any substitution by X could be described as unlawful or unauthorised. This thesis is not alone in identifying this limitation of Dr Nair's account.⁶⁶

For these reasons, it is submitted that Dr Nair's account fails adequately to explain the beneficiary's proprietary claim.

3. T/D's unauthorised exercise of power

The second variant of the 'lack of authority' account focuses on a different conception of authority,⁶⁷ according to which the unauthorised nature of T/D's exercise of power generates *B's claim to the original property and the traceable substitute*. This event is understood as a phenomenon that transcends the beneficiary's proprietary claim and covers '[e]very claim to recover misdirected assets, or their proceeds or their value' where there is a 'lack of authority of the person who caused the misdirection'.⁶⁸ Thus, the beneficiary's proprietary claim is considered analogous to a principal's or company's claim to recover property misapplied by agents or directors.⁶⁹

⁶⁵ Chapter 6, Part C.

⁶⁶ See also: C Mitchell, 'Book Review: *Claims to Traceable Proceeds: Law, Equity and the Control of Assets* by Aruna Nair; *The Law of Tracing in Commercial Transactions* by Magda Raczynska' (2018) 12 J Eq 123, 130.

⁶⁷ Chambers and Penner (n8) 273; Jaffey 'Explaining the Trust' (n61) 389, 395; Jaffey, *Private Law and Property Claims* (n61) 155–57.

⁶⁸ Chambers and Penner (n8) 273.

⁶⁹ Chambers and Penner (n8) 262. See also: *Re Hallett's Estate* (1880) 13 Ch D 696, 709–10, where there was little distinction made between the claim to recover property held by the solicitor as trustee and the claim to recover property held by the solicitor as bailee, although, as noted by Professor Lionel Smith, the judgment is unclear about how exactly the property was held by the solicitor, see further: L Smith, *The Law of Tracing* (Clarendon Press 1997) 124 fn 14.

This ‘lack of authority’ account might have some parallels with this thesis’ account in Chapter 9. It is important to be clear about how this thesis’ account differs and why it should be preferred. There are two reasons for this preference: the ‘lack of authority’ account (i) relies upon B’s proprietary rights (Part C.3.i) and (ii) fails to differentiate equity’s response to unauthorised exercises of power across institutional contexts (Part C.3.ii).

iii. Reliance on B’s proprietary rights

This second ‘lack of authority’ account is faced with the need to explain what is authority and why a lack of it matters. The proponents of this second account have relied upon B’s proprietary rights to do this work,⁷⁰ and according to this approach, the law should respond to an unauthorised transaction to protect or vindicate B’s proprietary rights.⁷¹

The problem with this reliance is circularity: it assumes that B has proprietary rights independent of the beneficiary’s proprietary claim. This thesis has shown that B does not have a true proprietary right capable of supporting this lack of authority account. B can only be understood to have a proprietary interest having regard to the claim itself. B’s interest is generated in response to the unauthorised (or on this thesis’ account, non-compliant) exercise of power, and that interest cannot in turn explain why the antecedent exercise of power is unauthorised. However, this is precisely what the second ‘lack of authority’ account does.

If reliance upon the proprietary nature of B’s interest is precluded, the second ‘lack of authority’ account is essentially reduced to the proposition that where there is an unauthorised misdirection of property, B’s proprietary claim should be available because the transaction was unauthorised. Such an argument assumes the points in issue: what is authority and why does a lack of it matter? B’s ‘proprietary’ right as asserted by the beneficiary’s proprietary claim cannot do this work.

iv. Lack of authority and why it matters

The next problem with the second ‘lack of authority’ account is that it assumes that an unauthorised transaction poses the same normative threat across institutions

⁷⁰ Jaffey, ‘Explaining the Trust’ (n61) 389, 395; Chambers and Penner (n8) 266–73.

⁷¹ *ibid.*

and that the same response should ensue.⁷² As discussed next, this is not, and should not be, the case. For example, a transaction entered into by the *trustee* outside the terms of the trust is normatively distinct from a transaction entered into by an *agent* in excess of her instructions, for example. This argument will be made by: (a) considering the connection between authority and equity's standards; (b) demonstrating the polysemic nature of authority; and (c) showing that the second 'lack of authority' account has failed to differentiate between equity's responses to normatively discrete events.

a. Authority and equity's standards

Pausing here, it is necessary to recall that this thesis has not sought to provide an exhaustive account or definition of authority. Nonetheless, it has been necessary to engage with this concept throughout this thesis owing to its prevalence in cases and academic materials. The position taken in this thesis is that equity's standards inform the concept of authority as that label is employed to describe the lawfulness or legitimacy of execution of power over trust property *in relation to the beneficiary's proprietary claim*. Authority, to the extent it is used in connection with the beneficiary's proprietary claim, can be understood as comprising equity's standards. An authorised transaction is one that meets equity's standards, and an unauthorised transaction is one that does not, referred to in this thesis as a non-compliant execution.

Chapter 9 has considered how equity's standards apply across other institutions, and the availability of proprietary claims which similarly assure these standards. To the extent that authority is used in connection with these proprietary claims, then, again, this concept can be understood in terms of equity's standards. Accepting these points, the question arises whether an unauthorised transaction should be understood to have the same normative significance across all these institutions, as is assumed by the second 'lack of authority' approach.

This thesis advocates the contrary approach, according to which authority, and the standards it encompasses, are polysemic. For the reasons discussed next, an unauthorised or non-compliant execution presents a different problem across

⁷² Chambers and Penner (n8) 262, 271, 273.

different institutions; for example, T's non-compliant execution is not the same as a non-compliant execution by a director or agent.

b. Authority is polysemic

It is possible to demonstrate the polysemic nature of authority in relation to one standard, which is generally accepted to inform authority as that concept is used to identify a lawful exercise of power across a range of institutional contexts. That standard is compliance with the terms of the mandate by which power is held.⁷³ A trustee, director, agent, partner and executor, for example, are all required to exercise power in accordance with their respective mandates. Accepting the relevance of this standard to authority generally, it is possible to show that it embodies different normative commitments depending on the institutional context. That is, there are different reasons why power should be exercised in accordance with the terms by which it is held. This permits this Chapter's claim that authority is polysemic and, further, that an unauthorised exercise of power may pose a different normative threat across various institutions.

Take for example an *agent*. The requirement for an agent to act within the terms of the mandate reflects the commitment that a principal should only be bound by the actions of an agent to the extent of the (actual or apparent) will of the principal. This commitment is embodied in Lord Cranworth's statement that '[n]o one can become the agent of another person except by the will of that other person ... in every case it is only by the will of the [principal] ... that an agency can be created'.⁷⁴

Accepting this, it follows that where an agent misdirects her principal's property in excess of instructions, yet is able to confer title on X,⁷⁵ the problem is that the principal is bound to the actions of her agent to which she did not consent, and ultimately to a transfer of her property to which she did not consent. The proprietary claim available to the principal to recover the misapplied property

⁷³ Authority is considered commensurate with compliance with the terms of the trust in: *Haldenby v Spofforth* (1839) 1 Beav 390, 395 (Lord Langdale); *Stroughill v Anstey* (1852) 1 De GM & G 635, 642–43 (Knight Bruce VC); *Space Investments Ltd v CIBC Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072, 1073–74 (Lord Templeman); Chambers and Penner (n8) 257.

⁷⁴ *Leask v Pole* (1863) 33 LJ Ch 155, 161.

⁷⁵ As in *Great Investments Ltd v Warner* (2016) 243 FCR 516.

reverses a transaction between the principal and X and thereby respects the principal's intention in relation to the use and enjoyment of her property.

In the context of the *express trust*, compliance with the terms of the trust mandate has a different normative significance. As discussed in Chapter 3, compliance with the terms of the trust mandate directly implements the essential feature of an express trust. When T transfers title to trust property to X contrary to the terms of the trust mandate, the significance of this unauthorised execution is different to the agency scenario. The problem is *not* that a titleholder has lost her title contrary to, or without, her consent. The trustee, as titleholder, *did* consent. The problem is that the trustee has used her title in a way that undermines the essential feature of an express trust, specifically that T will hold and use her title in compliance with the trust terms. As discussed in Chapter 3, there are different justifications for equity's choice to recognise the express trust, all of which are undermined if the essential feature of an express trust is missing.

Thus, an unauthorised or non-compliant exercise of power presents a discrete normative threat depending on the particular institutional context, owing to the different reasons why power should be exercised in accordance with the terms of the mandate. In the context of an express trust, compliance with the terms of the mandate ensures that power is exercised in a manner consistent with the essential feature of the express trust. In the agency context compliance with the terms of the mandate respects the principal's intention in relation to the conferral of power over her legal status.

c. Lack of authority account fails to delineate between normatively discrete events

By assuming that all unauthorised transactions are the same, the 'lack of authority' account fails to differentiate between equity's responses to normatively discrete events. Further, the 'lack of authority' account may have been too swift in dismissing⁷⁶ the case of misdirection by an agent as a possible case of unjust enrichment, given that the reason for restitution in this scenario *is* the lack of the principal's consent to a transfer of her property. However, it is ultimately beyond

⁷⁶ Chambers and Penner (n8) 258–59, 271–72.

the scope of this thesis to resolve this issue. The point is that such nuances are revealed only once the polysemic nature of authority is appreciated.

Finally, the ‘lack of authority’ account assumes that the same strength of assurance for equity’s standards should be provided; but, as Chapter 9⁷⁷ argued, that is not, and should not be, the case. As that Chapter explained, equity calibrates the strength of its assurance for equity’s standards depending on the institutional method for devolution of power. That Chapter argued that the calibration in the priority of response is justified having regard to the varied risk profiles that inhere in the different ways that power can be devolved. The ‘lack of authority’ account fails to appreciate this variation in the strength of equity’s assurance of its standards, and is another reason why this thesis’ account of the beneficiary’s proprietary claim, including the distinction with other proprietary claims should be preferred.

D. Claim does not protect against third-party interference with T’s obligations

The final account to be addressed is that developed by Professor Lionel Smith, who understands the claim as reflecting equity’s extension of the bilateral obligation between T and B to have an effect on X.⁷⁸ This account was introduced in Chapter 2.⁷⁹ In summary, it is that B’s claim is justified on the basis that ‘[i]t is wrong to get in the way of the performance of other people’s obligations’.⁸⁰ The beneficiary’s proprietary claim protects against X’s interference with the trustee’s performance

⁷⁷ Chapter 9, Part E.

⁷⁸ L Smith, ‘Equity Is Not a Single Thing’ in D Klimchuk, I Samet and H Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP forthcoming); L Smith, ‘Unravelling Proprietary Restitution’ (2004) 40 CBLJ 317, 321–30; L Smith, ‘Trust and Patrimony’ (2008) 38 RGD 379, 391–93; L Smith, ‘Transfers’ in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 122–24, 130–36; L Smith, ‘Fusion and Tradition’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 32–35; L Smith, ‘Philosophical Foundations of Proprietary Remedies’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of Unjust Enrichment* (OUP 2009) 301–05.

⁷⁹ Chapter 2, Part B.3.

⁸⁰ Smith, ‘Philosophical Foundations of Proprietary Remedies’ (n78) 292.

of her obligations by permitting B's claim for restitution from X in relation to the original trust property and the traceable substitute.

With respect, it is submitted that this thesis' account should be preferred as the better understanding of the operation and effect of the claim for two reasons: (i) the beneficiary's proprietary claim is not concerned with X's interference; and (ii) the beneficiary's proprietary claim is not concerned with the bilateral obligation between T and B.

i. The beneficiary's proprietary claim is not concerned with X's interference

The operation and effect of the beneficiary's proprietary claim does not indicate that it is concerned with X's interference. Chapter 6 demonstrated that X's responsibility is conditioned upon X's retention of the subject property.⁸¹ X's responsibility is *not* conditioned upon interference or knowledge.⁸² A third party's liability for inducing breach of contract,⁸³ and a third party's liability for inducement of breach of trust,⁸⁴ on the other hand, each require proof of the third party's intentional inducement.

ii. The beneficiary's proprietary claim is not concerned with the bilateral obligation between T and B

Contrary to Professor Smith's account, the operation and effect of the beneficiary's proprietary claim demonstrates that the claim is not concerned with the duty-right relationship between T and B. As the analysis in Chapter 5 demonstrated, the claim does not respond to a breach of duty by T. Further, Chapter 4 showed that the claim responds to a non-compliant exercise of power. The beneficiary's proprietary claim can be contrasted with inducement of breach of contract or knowing assistance, each of which requires proof of breach of a primary duty in addition to the third party's knowing involvement.

The facts that evidence a non-compliant exercise of power may also reveal a breach of duty by T but will not necessarily do so. Given the disassociation of the

⁸¹ Chapter 6, Part D.

⁸² *ibid.*

⁸³ *Lumley v Gye* (1853) 2 El & Bl 216, 232; *OBG Ltd v Allan* [2008] 1 AC 1 [8], [189]–[193].

⁸⁴ *Fyler v Fyler* (1841) 3 Beav 550, 561 (Lord Langdale MR); *Eaves v Hickson* (1861) 30 Beav 136, 141–42 (Romilly MR); *Farah Constructions* (n15) [161]; C Harpum, 'The Stranger as Constructive Trustee' (1986) 102 LQR 115, 141–44.

beneficiary's proprietary claim from breach of duty by T, it is difficult to say that its function, as distinct from incidental effect, is to protect against interference with T's performance of those duties.

E. Overreaching

This thesis' analysis also has implications for our understanding of the power to overreach, whether this is conferred on T or D. As discussed in Chapter 2, *overreaching* refers to a power, created by the trust terms, which may be held by T or a donee of power, D, to subordinate or extinguish B's existing interest under a trust in favour of a new interest in favour of X.⁸⁵ As discussed in Chapter 2, some previous accounts of the beneficiary's proprietary claim condition the availability of the claim on overreaching on the basis that the claim is available when there is a transaction that is ineffective to overreach and extinguish B's proprietary interest that is assumed to be a necessary condition for the beneficiary's proprietary claim.

This thesis advocates a different understanding of the relationship between overreaching and the beneficiary's proprietary claim. The beneficiary's proprietary claim is not contingent upon the non-occurrence of overreaching. The beneficiary's proprietary claim is not available *because* of a failure to overreach. As this thesis has shown, the beneficiary's proprietary claim does not assert or vindicate a pre-existing interest; rather, it asserts a new interest (B's equity for relief, and X's responsibility) that arises in response to a non-compliant execution.

Nonetheless, overreaching and the beneficiary's proprietary claim are mutually exclusive phenomena. On this thesis' account, the beneficiary's proprietary claim and overreaching both depend upon satisfaction of equity's standards. Overreaching is a power created by the terms of an express trust. Essentially, it is a power to vary the terms of the trust, so that X, rather than B, is entitled to trust property. Based on this thesis' arguments about the scope of powers created by an express trust, in Chapter 3,⁸⁶ overreaching is dependent upon compliance with equity's standards. The beneficiary's proprietary claim is dependent upon non-compliance with equity's standards.

⁸⁵ Chapter 2, Part B.2.

⁸⁶ Chapter 3, Part E.1.ii.b.

It is acknowledged that other overreaching powers may be conferred by statute;⁸⁷ for example, legislation may provide for certain equitable interests, including under an express trust, to be ‘overreached’ so that a purchaser of a legal estate in land acquires title free of a prior equitable interest. It is beyond the scope of this thesis to resolve the parameters of these statutory powers. However, it can be observed that this thesis may have future significance to the conditions for statutory overreaching. This is to the extent that statutory overreaching powers are, according to their terms, dependent upon the scope of the power to overreach conferred by the terms of the trust, which as this thesis has shown in Chapter 3, is dependent upon compliance with equity’s standards.

F. Change of position?

1. Change of position should *not* be available to X

The final substantive issue considered in this thesis is the ‘change of position’ defence. Chapter 8 explained that, as a matter of law, the defence does not apply to the beneficiary’s proprietary claim. Considered now are the implications of this thesis’ account of the claim for the question whether X *should* have a change of position defence.

As explained in Chapter 8, there is analytical uncertainty whether change of position is unique to unjust enrichment or is a defence that applies broadly to any claim for restitution. This thesis does not aim to resolve this question, and will instead demonstrate why the defence should not apply to the beneficiary’s proprietary claim, either as: (i) a defence confined to unjust enrichment (Part F.2); or (ii) a defence of more general application to restitution (Part F.3).

⁸⁷ See eg: Law of Property Act 1925 (Eng) s 2. See generally: C Harpum, ‘Overreaching, Trustees’ Powers and the Reform of the 1925 Legislation’ (1990) 49 CLJ 277; M Dixon, ‘Priority, Overreaching and Surprises under the Land Registration Act 2002’ (2017) 133 LQR 173; C Mitchell, D Hayton and P Matthews, *Underhill & Hayton: Law of Trusts and Trustees* (19th edn, LexisNexis 2016) [99.24].

2. Change of position – confined to unjust enrichment

To the extent that change of position is a defence unique to unjust enrichment,⁸⁸ the defence does not apply to the beneficiary's proprietary claim as the claim is not part of unjust enrichment.

3. Change of position – a general defence to restitution

If change of position is understood as a defence with a wider application to any claim for restitution, then its applicability to the beneficiary's proprietary claim remains in issue.⁸⁹ The rationale for this wider version of the defence is that a defendant should not be left worse off after making restitution, provided the application of the defence does not undermine the rationale informing the claim to which it applies.⁹⁰ There is some support for the application of this wider version of the change of position defence to the beneficiary's proprietary claim.⁹¹ This support is based on the need to ensure that X is not left worse off after satisfying B's claim, especially in light of X's strict responsibility.

This Part F.3 will set out this thesis' arguments why the wider 'change of position' defence should *not* apply to the beneficiary's proprietary claim. In making this argument, I acknowledge that I have previously argued in favour of the application of multiple defences to the one claim, in particular that estoppel by representation should apply as a defence to a claim to recover a mistaken payment, in addition to

⁸⁸ A view taken by: A Burrows, 'The Relationship between Unjust Enrichment and Property' in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008) 352–56; Birks, *Unjust Enrichment* (n2) 209–10.

⁸⁹ Assuming that the response to B's claim is restitution in the first place, see further: Chapter 1, Part C.2.iii.

⁹⁰ See eg: *Australian Financial Services* (n15) [77]–[80] (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 580 (Lord Goff); K Mason, J Carter and G Tolhurst, *Mason and Carter's Restitution Law in Australia* (3rd edn, LexisNexis 2016) [2410]; G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 680–82; E Bant, 'Change of Position: Outstanding Issues' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing 2016) 141–49, 162; E Bant, *The Change of Position Defence* (Hart Publishing 2009) 208; Edelman and Bant (n11) 354.

⁹¹ See eg: Bant, *The Change of Position Defence* (n90) 208; Mason, Carter and Tolhurst (n90) [2407]–[2410]; Virgo (n90) 680–82, 696; R Chambers, 'Proprietary Restitution and Change of Position' in A Dyson, J Goudkamp and F Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing 2016) 130–31.

change of position.⁹² It is necessary to be clear how the following arguments in this Part F.3 are consistent with my previous arguments.

My previous arguments were made on the basis that estoppel by representation is a doctrine of general application that, according to its own terms, should apply to mistaken payments. The position taken here is the same: a defence of general application can apply to the beneficiary's proprietary claim *if* this is consistent with the terms of that defence. This thesis' submission is that change of position, according to its own terms, is not applicable to the beneficiary's proprietary claim, and is based on two arguments: (i) the beneficiary's proprietary claim is not concerned with interpersonal justice that demands equal respect for the parties' choices (Part F.3.i); and (ii) the change of position defence would undermine the rationale of the beneficiary's proprietary claim (Part F.3.ii).

i. [The beneficiary's proprietary claim is not concerned with interpersonal justice](#)

The underlying premise of the arguments⁹³ for application of the wider change of position defence to the beneficiary's proprietary claim is that X's strict responsibility should be limited so that X is not left worse off after making restitution. These arguments assume that the rationale informing B's claim is the protection of B's choices in relation to her equitable proprietary rights. The implication is that the beneficiary's proprietary claim responds to reasons for restitution that are interpersonal between the parties; according to this, equal protection should be given to X's choices, via the change of position defence, as that afforded to B's choices. The underlying concern of these arguments is consistent with one of the formal requirements of corrective justice, that the parties be restored to their pre-transactional states of equilibrium, as set out in Part B.1 above.

The problems with reliance on equitable proprietary rights have already been explained in this thesis. Further, and accepting that equal respect for X's choices is required by change of position, this can only be relevant where the subject claim is one that is concerned with the claimant's choices. As Chapter 9 and this Chapter

⁹² J Hudson, 'Estoppel by Representation as a Defence to Unjust Enrichment: The Vine Has Not Withered Yet' [2014] 22 RLR 19.

⁹³ See n91.

have shown, the beneficiary's proprietary claim identifies a reason for restitution that is not based on interpersonal justice, and is not concerned with B's choices. Thus, X's choices are equally irrelevant. The claim implements equity's institutional commitment to preserve the essential feature and function of the express trust, and responds to a reason for restitution that does not require respect to be afforded for X's choices. Thus, change of position, according to its own terms of requiring equal respect for the parties' choices, is inapplicable to the beneficiary's proprietary claim.

Finally, the notion that change of position does not apply to certain categories of claims for restitution is not new. The defence does not apply, for example, to restitutionary claims for tax paid but not due;⁹⁴ nor does it apply where illegality operates as a bar to the defence.⁹⁵ The beneficiary's proprietary claim is arguably yet another instance where a defence of potentially wide application, according to its own terms, does not apply.

ii. **Change of position undermines equity's institutional commitment to the express trust**

The final argument of this thesis is that change of position should not apply because its application would undermine the rationale for the beneficiary's proprietary claim. Recall that the wider change of position defence, according to its own terms, applies *only where, having regard to the underlying policy aims of the subject claim*, it would be inequitable to require the defendant to make restitution.⁹⁶ These terms require an assessment of whether the application of the defence would undermine the rationale of the claim against which it is raised.

It is submitted that, having regard to the policy aims of the beneficiary's proprietary claim, it would *not* be inequitable to require X to satisfy B's equity for relief. This is so even where X would be left worse off due to her detrimental change of position

⁹⁴ *Test Claimants in the FII Group Litigation v HMRC (No 2)* [2014] EWHC 4302 [309]–[315] (Henderson J); *Goff & Jones* (n2) [27–61]–[27–63]; Mason, Carter and Tolhurst (n90) [2410]; Burrows, *The Law of Restitution* (n2) 543, 698; E Bant, 'Change of Position as a Defence to Restitution of Unlawfully Exacted Tax' [2012] LMCLQ 122.

⁹⁵ *Barros Mattos Junior v MacDaniels* [2004] EWHC 1188 [39]–[43] (Laddie J); Bant, *The Change of Position Defence* (n90) 184–86.

⁹⁶ *Australian Financial Services* (n15) [77]–[82] (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Lipkin Gorman* (n90) 580 (Lord Goff); Mason, Carter and Tolhurst (n90) [2410].

– one that is not otherwise protected by one of the defences or discretionary factors considered in Chapter 8. On this thesis’ account, the beneficiary’s proprietary claim implements equity’s institutional commitment to the express trust by providing an assurance of equity’s standards in the execution of power.

Accepting the arguments made in Chapter 9, the function of the beneficiary’s proprietary claim is to allow B to transfer the responsibility of assuring equity’s standards to X. The purpose of the claim is to make X underwrite equity’s institutional commitment in a way that may require X to be left worse off. The change of position defence is inconsistent with the function and rationale for the claim and would erode the assurance it provides to the express trust.

In support of this argument are cases where B’s claim is given priority over a later equitable assignee, as in *Cloutte v Storey*,⁹⁷ *Dudley v Champion*⁹⁸ and *Stroughill v Anstey*.⁹⁹ These cases demonstrate the judicial preference for equity’s institutional commitment over X’s detrimental change of position. Further, Lord Simonds in *Ministry of Health v Simpson*, expressly dismissed the argument that X ‘ought not in conscience to be ordered to refund’ on the basis of her detrimental change of position, explaining that the ‘established ... rule of equity ... did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid’.¹⁰⁰ These cases demonstrate that the policy underlying the beneficiary’s proprietary claim has been prioritised over ensuring that X is not left worse off due to her detrimental changes in position.

G. Conclusion

This Chapter has used this thesis’ account of the function and rationale of the beneficiary’s proprietary claim to address some outstanding issues. A consistent argument has been made in this Chapter that previous accounts of the claim do not accurately map the phenomenon as evidenced by the cases. In particular, B’s claim to the traceable substitute is not part of the law of unjust enrichment; nor is it concerned with X’s interference or T’s breach of duty. Nor should B’s claim to the

⁹⁷ *Cloutte* (n38).

⁹⁸ *Dudley* (n38).

⁹⁹ *Stroughill* (n38).

¹⁰⁰ *Ministry of Health v Simpson* [1951] AC 251, 276 (Lord Simonds).

original or traceable substitute be understood as being part of a broader and uniform response to unauthorised transactions. These accounts, according to their own terms, fail accurately to explain, let alone justify, the beneficiary's proprietary claim.

This Chapter has also considered the role of change of position as a defence to the beneficiary's proprietary claim. Accepting that change of position is a defence of general application to restitution, this Chapter had argued that the defence does not apply because its application would undermine equity's institutional commitment to preserving the essential feature of the express trust.

Chapter 11 – Conclusion

A. Summary of main argument

This thesis has sought to understand the beneficiary's proprietary claim according to its operation and effect as derived from the relevant cases. This thesis demonstrates that the cases reveal, at least implicitly, a stable and consistent pattern according to which the beneficiary's proprietary claim provides an assurance for equity's standards, which require power to be exercised in compliance with the trust terms, with fidelity to the donor's purpose and bona fide. The form of that assurance is that *if* power over trust property is exercised inconsistently with equity's standards (referred to as a 'non-compliant execution'), B has an equity for relief necessary so that it is as if the non-compliant execution had not occurred.

The main contribution of this thesis is to offer a novel explanation of both the claim *and* the broader phenomenon by which the claim should be understood. That phenomenon is equity's institutional commitment to the essential feature of an express trust. The essential feature is that T holds and exercises power over trust property in accordance with the trust terms. The significance of this feature is that the various normative justifications for the express trust are premised on the expectation that an express trust has this feature. Equity's standards collectively define the minimum necessary for an exercise of power to give effect to the essential feature. Thus, the significance of a non-compliant exercise of power is that the execution is inconsistent with the essential feature. The normative justifications for the express trust are undermined. The *imposition* of equity's standards, and their *assurance* via the beneficiary's proprietary claim, ensure that the express trust functions in line with its normative expectations and equity's choice to recognise the institution.

This thesis thus advocates a very different account of the claim, and reason for its existence, compared with previous accounts. Those previous accounts understand the claim in terms of interpersonal justice, whether that be based specifically on B's proprietary rights, unjust enrichment, trustee wrongdoing or third-party interference. On this thesis' account, the beneficiary's proprietary claim responds to the problem that power has been exercised in a manner that undermines the

reasons for recognition of the express trust as an institution. Further, this problem is acute having regard to the institutional vulnerability of the express trust. The express trust is an institution that relies upon the devolution of power for its function. The devolution of power is what makes the express trust a highly flexible and malleable option, but it presents a concomitant risk that power will be exercised in a manner that undermines its essential feature.

This thesis has argued that the assurance of equity's standards via the beneficiary's proprietary claim is justified having regard to the institutional vulnerability of the express trust. The claim functions as a pre-packaged insurance policy that allows B to transfer the responsibility of assuring equity's standards to X. This transfer has the effect of insulating the express trust from contingencies that would undermine equity's institutional commitment, such as T's bankruptcy/insolvency. Similarly, this thesis has argued that the extension of the claim to traceable substitutes and remote recipients can be justified as necessary responses to the institutional vulnerability of the express trust. These extensions provide B with a greater range of potential targets for B's claim, and ensure the viability of the claim irrespective of the form of property settled on trust or the nature of successive dealings with trust property.

One challenge for this thesis has been to account for the relationship with, and distinctions between, the beneficiary's proprietary claim and proprietary claims existing in other institutional contexts. This thesis has demonstrated the existence of important nuances in the various assurance regimes. In particular, the priority of equity's assurance varies across institutions, with a higher priority afforded to the beneficiary's proprietary claim in the context of the express trust, compared with other contexts, such as a company. The variation in the priority of response can be justified having regard to the risk profile presented by the way an institution devolves power. When power is held incidental of title to trust property, as in the case of an express trust, a stronger priority of assurance is provided in the form of an equitable estate; when power is devolved differently, equity re-calibrates its assurance. A director or agent, for example, holds a power over the company's or principal's title to property, and the priority of assurance provided in this context is a mere equity. It is the different method for power devolution that justifies equity's calibration of response in terms of the priority of the assurance provided.

This thesis has also considered whether equity’s standards have the same normative significance across institutions, and, correspondingly, whether a non-compliant execution should be understood as posing the same normative threat across those institutions. This thesis has demonstrated that the reasons why an agent should exercise power in accordance with the terms defined by her principal are fundamentally different to the reasons why T should exercise power in accordance with the terms of the trust mandate. In turn, a non-compliant execution presents a discrete problem across institutions.

These arguments represent a novel approach to understanding the function and rationale for the beneficiary’s proprietary claim. In particular, this thesis understands the claim as an implementation of equity’s institutional commitment to the express trust, rather than in terms of an interpersonal relationship between B and X. The significance of this thesis’ account of the claim is twofold. First, it advances our understanding of the claim and its place in the express trust landscape. Second, this thesis has identified a novel role for equitable doctrine in controlling powers to implement equity’s institutional commitments. These contributions and their significance for future research are discussed in more detail in Parts B and C, respectively.

B. The beneficiary’s proprietary claim – restated

One of the key contributions of this thesis is to facilitate an accurate articulation of: (1) the elements of the beneficiary’s proprietary claim; (2) the extent of B’s equity for relief; (3) the condition for X’s responsibility; (4) those to whom the claim is available; and (5) potential pleas that X can raise in response to B’s claim. These are set out now.

1. Elements of B’s claim

To assert the beneficiary’s proprietary claim, B must show four elements:

1. the existence of an express trust;
2. that there has been an exercise of power held subject to an express trust, either by T or D, and that exercise is *non-compliant* in the sense that it fails to meet one or more of equity’s standards, being compliance with the trust terms, fidelity to the donor’s purpose and bona fides;

3. that X retains, in the sense of having a legal or equitable right or power in relation to, the subject property; and
4. that the subject property is either the specific property originally subject to the non-compliant execution, or property identified as the traceable substitute.

2. Extent of B's equity for relief

If B can make out the elements above, *prima facie* B will be entitled to equitable relief requiring X to exercise X's powers over the subject property as necessary so that it is as if the non-compliant execution had not occurred.

The specific forms of relief necessary to give effect to this equity can include orders requiring X to convey title to specific property, pay the monetary value of that property, or deliver up documents, in addition to injunctive or declaratory relief, or orders dismissing X's own proprietary claim.

3. Condition for X's responsibility

X's responsibility to B's claim is conditioned upon X's retention of the subject property. X's responsibility is strict in the sense that it does not depend upon X's level of knowledge or wrongdoing.

X's responsibility to B's claim is limited in that X will not be responsible if X does not retain the subject property at the date of judgment. In such a case, B will need to establish some additional cause of action, such as knowing receipt.

4. To whom the claim is available

The equity for relief asserted by the beneficiary's proprietary claim accrues to 'B' if B: (i) qualifies as an object under the subject trust, either in accordance with list certainty or criterion certainty; (ii) holds the office of trustee; or (iii) is someone interested in a charitable trust, and where necessary has leave of the Attorney-General.

5. Defences, denials and equitable discretionary factors

X will be able to defeat B's equity altogether, or seek some different or lesser form of relief to that sought by B, if X can make out a defence or denial, including, but not limited to:

1. indefeasibility of title;
2. the plea of bona fide purchaser;
3. equitable discretionary factors and/or bars to relief, such as laches, acquiescence, consent, estoppel or third-party interests;
4. counter-restitution in X's favour *to the extent* that B or the trust estate has benefited from X; and
5. certain statutory defences, such as indefeasibility of title to land.

Equitable discretion will inform the court's assessment of what form of relief is the minimum necessary to satisfy B's equity, but is not relevant to the extent of B's equity, which is as stated above in Part B.2. Except where provided otherwise by statute, the 'change of position' defence does not apply.

C. Equity's control of institutional power and definition of authority

As explained in Part A above, a key contribution of this thesis is its demonstration of a novel role for equitable doctrine in controlling powers through the imposition of equity's standards, and that equity recognises an entitlement to equitable relief, both of which give effect to equity's institutional commitment to the express trust. The imposition and assurance of equity's standards ensure that power will not be exercised in a manner that undermines the reasons for equity's choice to recognise the express trust. This thesis' identification of equity's standards and the assurance of these standards may inform a future research agenda that examines the extent to which equity's institutional commitment is extrapolated across other institutional contexts. This thesis has already observed the imposition of equity's standards, and the existence of proprietary claims, across other institutions. Future research could examine the extent to which these other proprietary claims can be understood as providing an assurance for equity's standards that implement equity's commitment to ensuring a given institution functions in accordance with its normative expectations.

Another contribution of the arguments in this thesis relates to *authority* as that concept is used to describe a lawful exercise of power. The meaning and significance of authority, and an exercise of power that is *unauthorised*, has been a recurrent theme in this thesis. It has been beyond the scope of this thesis to provide an exhaustive account of authority. What this thesis has shown is that *authority*, to

the extent that the concept is used in relation to the beneficiary's proprietary claim, encompasses equity's standards. An *unauthorised* exercise of power is thus an execution that undermines the essential feature of an express trust, the significance of which is that the express trust has failed to function in line with its normative expectations. The idea that authority may embody equity's standards may inform a future research agenda that aims to define an equitable conception of authority as that term is used within express trusts, and across other institutional contexts.

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